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CALIFORNIA REPORTER

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SECOND SERIES

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29 Cal.2d 258

PULCIFER et al. v. ALAMEDA COUNTY et al.

S. F. 17209.

Supreme Court of California, in Bank.

Nov. 22, 1946.

1. Municipal corporations 🔑111(2)

Where the language of a statute indicates that the legislature intended it to be exclusive with respect to the entire subject or field, an ordinance purporting to regulate the matter within such field is invalid but where the field has not been fully occupied by the statute, additional or supplementary requirements may be imposed by local regulation.

2. Officers 🔑100(1)

The charter provision of Alameda county that compensation of elective officers shall be fixed at least six months prior to the election of such officers is valid and is not in conflict with constitutional provision that the compensation of any city, county, town or municipal officer shall not be increased after his election or during his term of office. Const. art. 11, § 5, as amended in 1944; § 7½; § 9, as amended in 1924.

3. Officers 🔑100(1)

Where constitutional provision was that the compensation of any city, county, town or municipal officer shall not be increased after his election or during his term of office the doctrine of expressio unius excluded any intention to impose additional limitations upon the power of counties to regulate the fixing of compensation. Const. art. 11, § 9, as amended in 1924.

4. Justices of the peace 🔑15

The charter provision of Alameda county that the compensation of elective officers shall be fixed at least six months prior to the election of such officers applies to justices of the peace.

5. Statutes 🔑227

In order to determine whether a particular statutory provision as to time is mandatory or directory, the court must ascertain the legislative intent.

6. Statutes 🔑181(1, 2), 205

In the absence of express language, the intention of the legislature must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done and from the consequences which would follow the doing or the failure to do the particular act at the required time.

7. Statutes 🔑227

When the object of a statute is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose, and the courts will look to see whether the provision is of the essence of the thing to be accomplished.

8. Statutes 🔑227

Statutory provisions will be considered mandatory if the language contains negative words or shows that the designation of the time was intended as a limitation of power, authority or right.

9. Counties 🔑69(1)

The charter provision of Alameda county that the compensation of elective officers shall be fixed at least six months prior to the election of such officers is mandatory.

10. Officers 🔑100(1)

The charter provision of Alameda county that the compensation of elective officers shall be fixed at least six months prior to the election of such officers uses the term "fixed" in the ordinary sense of a stabilization or definite determination and excludes the idea that salaries so fixed may thereafter be changed during officers' terms of office.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixed".

◆

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Mandamus proceedings by Harry W. Pulcifer and others against the County of Alameda and others to compel the respondents to pay salaries at increased rates established by ordinance. From a judgment dismissing the proceedings, the plaintiffs appeal.

Judgment affirmed.

Prior opinion, see 166 P.2d 406.

J. Paul St. Sure and Edward H. Moore, both of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., James H. Oakley, Asst. Atty. Gen., Robert E. Reed, Deputy Atty. Gen., and Charles W. Johnson, Deputy Director, Department of Justice, of San Francisco, for respondents.

GIBSON, Chief Justice.

The petitioners, justices of the peace of Alameda County and the personal representatives of a deceased justice, seek to compel respondents to pay salaries at the increased rates established by an ordinance adopted May 28, 1942, within six months of the election of such officers. They have appealed from a judgment of dismissal which followed the sustaining of a demurrer to their petition.

This appeal involves the validity and effect of section 12(b) of the Charter of Alameda County which provides that "The compensation of elective officers shall be fixed at least six months prior to the election of such officers. The compensation of elective officers shall not be increased or diminished after the election of such officer or during his term of office."

Petitioners contend (1) that section 12(b) of the Alameda Charter is unconstitutional, (2) that it is not applicable to justices of the peace, (3) that its provisions are directory and not mandatory, and (4) that the power to "fix" includes the power to change.

It should be noted parenthetically that the salary claims of petitioners cover the period from January 1, 1943, the date the terms of office commenced, to April 30, 1944, which was prior to the adoption of the constitutional amendment authorizing the Legislature to suspend the prohibition against salary increases, and that therefore the decisions in Busch v. Turner, 26 Cal.2d 817, 161 P.2d 456, and Holland v. Byram, 28 Cal.2d 567, 170 P.2d 937, are not applicable. Hence this opinion is not to be construed as limiting any remedy which petitioners may have under the rules of those cases.

It is contended that section 12(b) of the charter is unconstitutional because at the date of its adoption the entire field of legislative activity with respect to salary increases was occupied by section 9 of article XI of the Constitution of the State of California which provided that "The compensation of any city, county, town or municipal officer shall not be increased after his election or during his term of office * * *."[1]

[1-3] It has been held that where the language of a statute indicates that the Legislature intended it to be exclusive with respect to the entire subject or field, an ordinance purporting to regulate a matter within that field is invalid. Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515. Where the field has not been fully occupied by the statute, however, additional or supplementary requirements may be imposed by local regulation. Natural Milk, etc., Ass'n v. City, etc., of San Francisco, 20 Cal.2d 101, 124 P.2d 25; see Pipoly

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[1] Section 9 was repealed in 1933, subsequent to the adoption of the Alameda County Charter, but at the same time section 5 of the article XI was amended to include similar language with the following proviso: "The provisions of this section shall not be construed to abridge, modify or otherwise affect the provisions of sections 7½, 7½a and 8½ of this article, relating to county or city and county charters."

v. Benson, supra, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515. Applying this principle to the present case, the charter requirement that compensation be fixed six months prior to election is valid unless the language or scope of the constitutional provision indicates that it is intended to be exclusive and, consequently, that there is no room left for supplementary local regulation. See Pipoly v. Benson, supra, 20 Cal.2d 366, 371, 125 P.2d 482, 147 A.L.R. 515. There was nothing in section 9 of article XI, however, which indicated that it was intended to cover anything other than salary increases after election. Unlike the situation in the Pipoly case, where the statute constituted a comprehensive and detailed regulation of vehicle and pedestrian traffic, section 9 was but a single limitation upon the general powers granted by section 7½ of article XI to freeholders' charter counties to regulate compensation. Section 7½ authorizes any county to frame a charter for its own government and to provide for the election or appointment of certain officers, including justices of the peace, and for "The times at which and the terms for which such persons shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors. * * *" The charter provision clearly is not inconsistent with any express language in section 9, and in view of the broad powers granted to the counties by section 7½, we cannot hold that it was the implied purpose of section 9 to prevent additional local regulations with respect to salary increases before election, or that section 9 occupied the entire field. Moreover, since section 9 referred specifically to increases after election, under the doctrine of expressio unius, the implication, if any, is that there was no intention to impose additional limitations upon the power of counties to regulate the fixing of compensation.

[4] It is next contended by petitioners that the six months' limitation prescribed in section 12(b) applies only to county officers, and not to township officers, such as justices of the peace, whose salaries are regulated exclusively by section 23 of the charter. There is no merit in this contention. Sections 21–24 relate to the number of justices of the peace, constables, and clerks, their election, appointment and compensation. Section 23 provides that the compensation of justices of the peace shall be fixed by the board of supervisors and that their compensation need not be uniform for the several townships or proportionate to population. Section 12(b) appears in that portion of the charter entitled "General Powers of the Board of Supervisors" (§§ 11–14½) which deals with all types of public officers and employees within the county organization and is not restricted to county officers as opposed to township officers. When the two sections are read together, section 23 authorizes the board of supervisors to fix the salaries of justices of the peace and section 12(b) requires that the salaries of such officers be fixed at least six months prior to the election of such officers.

[5-8] It is further contended that the provision that "The compensation of elective officers shall be fixed at least six months prior to the election of such officers" is merely directory. In order to determine whether a particular statutory provision as to time is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. East Bay Municipal U. Dist. v. Garrison, 191 Cal. 680, 686, 218 P. 43. When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose (Calaveras County v. Brockway, 30 Cal. 325, 343), and the courts will look to see whether the provision is of the essence of the thing to be accomplished. Francis v. Superior Court, 3 Cal.2d 19, 28, 43 P.2d 300. While time provisions are often held directory, they will be considered mandatory if the language contains negative words or shows that the designation of the time was intended as a limitation of power, authority or right. People

v. Board of Sup'rs of Lake County, 33 Cal. 487, 492.

[9] The Alameda County Charter requirement that salaries "be fixed at least six months prior to the election" is a limitation on the power to fix, and to construe it as directory would defeat the apparent purpose and render the time provision meaningless, whereas to construe it as mandatory will give effect to what appears to have been the intention of the framers of the charter. The provision supplements the period covered by the constitutional prohibition contained in section 9, thereby rendering its purpose effective when applied to acts of legislative bodies acting under freehold charters. It has been held that the purpose of the constitutional prohibition was not solely to prevent persons in office from using the power and influence of their positions to secure increases in salary after election, but also to prevent a candidate from using his prospective power and influence upon the legislative body, and that a law increasing salaries, enacted before but not effective until after election, could not affect the compensation to be paid the candidate elected or appointed for that term. Harrison v. Colgan, 148 Cal. 69, 74, 76, 82 P. 674; see, also, Rutledge v. City of Eureka, 195 Cal. 404, 419, 234 P. 82; Woods v. Potter, 8 Cal.App. 41, 46, 95 P. 1125. Charter counties have different time factors to consider in respect to elections and effective dates of legislation from those affecting the Legislature, and the framers of the charter may have considered that six months was a more adequate period in which to prevent a possible concert of action between the legislative body and candidates for office under the charter.

The Supreme Court of Wisconsin, in treating as mandatory a statute containing a time limitation on the power of county officers to fix salaries, stated: "It is quite clear that the statute contemplates that the power shall be exercised at a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office." Hull v. Winnebago Co., 54 Wis. 291, 11 N.W. 486, 487; see, also, Feavel v. City of Appleton, 234 Wis. 483, 291 N.W. 830, 833, and cases cited.

[10] Finally, it is argued that the power to "fix" includes the power to change, and hence, although the charter requires that salaries be fixed six months prior to election, they may be changed at any time before election. The process of fixing implies, primarily a stabilization or definite determination (Webster's New International Dictionary (2d ed., 1941), p. 958), and no reason is advanced why it should be given other than its ordinary implication here. The cases holding that the "power to fix" includes the "power to change" deal with general grants of power (see Fidler v. Board of Trustees, 112 Cal.App. 296, 301, 296 P. 912; Abraham v. Sims, 2 Cal.2d 698, 711, 42 P.2d 1029; 17 Words and Phrases, Perm.Ed., p. 100 et seq.) and do not apply to a limiting proviso that the general power shall be exercised prior to a given time. See Hull v. Winnebago Co., supra, 54 Wis. 291, 11 N.W. 486, 487; Feavel v. City of Appleton, supra, 234 Wis. 483, 291 N.W. 830, 833.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

29 Cal.2d 352

PHOENIX MUT. LIFE INS. CO. v. BIRKELUND et al.

L. A. 18940.

Supreme Court of California, in Bank.

Dec. 3, 1946.

1. Insurance 🔑586

An ordinary beneficiary of a life policy has merely an expectancy of an incomplete and inchoate gift which is revocable at the will of the insured, whereas a contract beneficiary has a vested right in the proceeds of the policy.

2. Insurance 🔑585(1)

A contract beneficiary of a life policy who has failed to give the consideration promised is in no position to claim protection of her equitable rights beyond the measure of her performance.

3. Insurance 🔑587

Where husband agreed to deliver policy on his life to wife who agreed to pay subsequent premiums out of alimony payable to her, but husband failed to deliver the policy and wife paid no premiums, wife's failure to demand possession of policy and to pay premiums constituted a consent to change of beneficiary so far as values might be added to the policy by the payment of future accruing premiums.

4. Insurance 🔑211

Where husband agreed to deliver policy on his life to wife who agreed to pay subsequent premiums out of alimony payable to her, but husband failed to deliver the policy and wife paid no premiums, husband's agreement to deliver the policy was at most an unexecuted agreement to assign and operated as an equitable assignment of the proceeds rather than of the policy itself.

5. Estoppel 🔑110
Pleading 🔑78, 403(1)

The general rule is that one who relies upon estoppel or laches as a defense must plead facts constituting such estoppel or laches where there is an opportunity to do so, but such rule does not apply where the facts appear on the face of the adversary's pleading.

6. Equity 🔑71(1)

Mere delay in commencing an equitable proceeding without a showing of inequitable conduct or prejudice suffered thereby is not sufficient to bar the action.

7. Estoppel 🔑110
Insurance 🔑593(1)
Pleading 🔑78

Where husband agreed to deliver policy on his life to wife who agreed to pay subsequent premiums out of alimony payable to her but husband failed to deliver the policy and wife paid no premiums and husband remarried and changed beneficiary to second wife who directly paid a portion of the premiums, first wife showed only an equitable right to recover such proportion of proceeds of policy as the amount of premiums paid at time of agreement bore to the total premiums paid before insured's death, and second wife was entitled to balance although she had not pleaded estoppel or laches.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action of interpleader by Phoenix Mutual Life Insurance Company against Hilda Olsen Birkelund and Ruth Lillian Birkelund to determine conflicting claims made by the defendants to proceeds of a policy of insurance issued on the life of James R. Birkelund, deceased. From the judgment rendered, Ruth Lillian Birkelund appeals.

Judgment modified, and as modified affirmed.

Prior opinion see 154 P.2d 745.

Reynolds & Painter and Sidney A. Cherniss, all of Los Angeles, for appellant.

Helgoe & Hart and John K. Ford, all of Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiff insurance company filed this action in interpleader after each of the two defendants had made claim upon it for the proceeds of a policy of insurance issued by it in 1921 on the life of James R. Birkelund, now deceased. One of the defendant-claimants is Hilda Olsen Birkelund, hereinafter called Hilda, the first wife of the decedent, and the other defendant-claimant is Ruth Lillian Birkelund, hereinafter called Lillian, who also entered into a marriage with the decedent. Hilda asserts equitable claims, deriving from a property settlement agreement with James, executed in 1931, whereby he agreed "to deliver" the policy to Hilda and she agreed to pay the accruing premiums. James did not deliver the policy to Hilda but instead, in 1932, named Lillian as beneficiary and delivered the policy to her. For approximately eleven years after the settlement with Hilda, James and Lillian paid the premiums. Then James died and both Hilda and Lillian demanded the proceeds. Previously Hilda had never demanded the policy and had paid no premiums. Lillian urges both a legal claim as the beneficiary named in the policy and an equitable claim, not pleaded, based on Hilda's asserted neglect. She appeals from a judgment decreeing that the proceeds of the policy, less $271.20 awarded to her as repayment of premiums paid by her on the policy (and subject to costs awarded Hilda), shall be paid to Hilda. We have concluded that Hilda has established an equitable right to recover such proportion of the proceeds of the policy as the amount of premiums paid at the time of the property settlement agreement bears to the total premiums paid and that Lillian is entitled to the remainder.

As indicated above, by the terms of the policy as it stood at the death of the insured Lillian is the designated beneficiary and is, accordingly, prima facie entitled to its proceeds unless Hilda has established superior equitable rights. To establish such rights Hilda relies upon a property settlement agreement with James, executed in 1931 in the State of Minnesota where the parties were then domiciled, whereby, among other things, James agreed "to deliver" to Hilda the policy in question subject to a loan of $450. No specific date for the delivery was fixed. James agreed to pay the *interest* on the policy loan but not the principal. Hilda agreed "to pay the premiums" on the policy "subsequent to the current year [1931] out of the alimony and support money received from the defendant." The agreement further provided that "the * * * interest of the defendant [James] in the homestead * * * be and is hereby set over and given to the plaintiff [Hilda] * * *. That the defendant [James] * * * agrees to pay all the taxes * * * on said premises * * * for the year 1930 on or prior to the 31st day of October, 1931, and * * * to give to the plaintiff all of the household effects and furniture now in the home * * * [and] to pay to the plaintiff the sum of Two Hundred Fifty Dollars * * * per month, beginning the 1st day of November 1931, said payment * * * to constitute all of the alimony which said defendant shall be required to pay. * * * That the foregoing is a full and complete property settlement between the parties. * * *"

The settlement was first entered into on October 26, 1931, and at that time the provision relative to insurance read in full as follows: "The defendant agrees to deliver to said plaintiff herein an insurance policy or policies upon the life of said defendant with premiums paid for the year 1931, in the amount of at least Ten Thousand Dollars ($10,000.00), said policy or policies not to be incumbered by any loan. The said plaintiff herein agreeing to pay the premiums thereon subsequent to the current year out of the alimony and support money received from the defendant."

On November 23, 1931, the agreement regarding insurance was modified to read as follows: "The defendant agrees to deliver to the said plaintiff herein insurance policies upon his life as follows: Two policies for Five Thousand ($5,0000.00) Dollars, each in the Phoenix Mutual Insurance Company, each of which policies is encumbered with a loan of Four Hundred Fifty ($450.00) Dollars, and one policy in the Berkshire Life Insurance Company in the amount of Twelve Hundred ($1200.00) Dollars, which later policy is unencumbered by any loan. The plaintiff herein agreeing to pay the premiums subsequent to the year 1931 on the two policies with the Phoenix Mutual Insurance Company, said payments to be made out of the alimony and support money received from the defendant herein. The defendant herein agrees to carry at all times the premium on the Twelve Hundred ($1200.00) Dollar policy above named, and in addition thereto to pay at all times the interest as it comes due on the Nine Hundred

($900.00) Dollar loan from the Phoenix Mutual Insurance Company on the two first policies above mentioned." It is upon the language above quoted that Hilda relies to establish her claim to the proceeds of the policy. Only one $5,000 policy is here involved, the other having been cashed in by James in 1937.

On December 10, 1931, the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota, entered its decree "That plaintiff [Hilda] is not entitled to a decree of divorce from the defendant herein" but "That the defendant [James] shall pay and continue to pay, until further order of the Court, the amounts provided in the stipulation on file herein" (such stipulation being the property settlement hereinabove described), and that "Nothing herein shall be construed as a bar to the prosecution of an action for divorce on the ground of desertion, when such desertion shall have reached the time when it becomes a ground for divorce."

The policy in question recites that the insurer "Agrees to pay to [the named beneficiary] * * * the Sum of Five Thousand Dollars, upon receipt at its Home Office of this policy duly discharged together with due proofs of the death, while this policy is in force, of James R. Birkelund. * * * The Company Will Also Pay *to The Insured* During Permanent and Total Disability An Income of Fifty Dollars a Month and will waive the payment of premiums hereunder during such disability. * * *" (Italics added.) The stated premiums were fixed at $67.80 "payable on the 2nd day of each February and August until fifty-six full years' premiums shall have been paid or until the death of the Insured." The policy further provides: "9. Beneficiary Clauses * * * (b) The insured if of legal age may, whenever and as often as he likes, change any beneficiary designated herein by filing at the Home Office of the Company a written notice thereof duly executed and accompanied by the policy for record and endorsement of the change thereon by the Company. Unless the notice is so recorded and endorsed it shall not take effect, but when recorded and endorsed, whether the insured be then living or not, it shall relate back and take effect as of the date of the execution of said notice by the insured.

"(c) The interest of any beneficiary hereunder shall be subject to and bound by any assignment, pledge or release of this policy by the insured, dated either prior or subsequent to the nomination of such beneficiary."

At the time the policy was first issued it contained a special indorsement providing that "At the request of the insured * * * the beneficiary provisions of paragraphs b and c, Section 9 hereof are hereby made inoperative and the beneficiary hereunder is made irrevocable." Hilda then was named as the sole and irrevocable beneficiary. However, on April 23, 1930, Hilda joined with James in a writing cancelling the above quoted special indorsement and restoring to the insured, James, the right to change beneficiary as provided in section b. On that same date James exercised his right to change beneficiary by nominating Hilda as primary beneficiary and his daughters Mary Jane and Joan as secondary beneficiaries.

In 1931, by the property settlement agreement hereinabove quoted, James agreed to "deliver" the policy to Hilda, subject to the $450 loan, and she agreed to pay accruing premiums, but, as previously mentioned, the policy was never delivered to Hilda and she never paid any premiums on it. On July 5, 1932, James and Lillian married and thereafter lived together as husband and wife until his death on April 25, 1942. (The legality of this marriage was questioned by Hilda who claimed that she was never completely divorced from James but this issue was held immaterial by the trial court.) On December 20, 1932, James presented the policy to the insurer together with a request for change of beneficiary nominating Lillian as primary beneficiary and his daughters Mary Jane and Joan as secondary beneficiaries. Such change of beneficiary was duly endorsed on the policy and it was returned to James. In the same month he delivered the policy itself to Lillian who thereafter retained it. Subsequently accruing premiums were paid by James or Lillian, the court finding specifically that Lillian directly paid premiums in the sum of $271.20. There was testimony, not directly disputed, that Lillian, prior to December, 1932 (the date she was named as beneficiary), loaned James about $2,500 and that after that date she loaned him about $7,000. Some of the money so advanced was used for paying obligations of James (including living expenses of James and Lillian and alimony to Hilda). There is, however, no allegation in Lillian's pleadings and no finding by the court that any part of this money was advanced by Lillian in reliance upon her designation as beneficiary or her possession of the policy.

In 1937, at a time when James was allegedly in default in alimony payments, Hilda instituted an action in Los Angeles County to enforce the settlement agreement and the Minnesota judgment. According to the language of her brief (and as supported by her testimony) "She asked her Los Angeles counsel if James could be forced to carry the policies and was advised by her counsel that he could not be so forced." Neither before nor after that time did she ever demand delivery of the policy in question nor did she pay any premium thereon or make any inquiry of the insurer concerning the premiums or the status of the policy although she at all times knew the identity of the insurer.

The record is not entirely clear as to whether James eventually paid all the money to Hilda which he had contracted to pay. It does appear, however, that for a number of years after the contract was executed he fully performed it except as to delivery of the insurance policies mentioned; that during 1934 and 1935 he suffered from illness and defaulted in a portion of the monthly payments; that Hilda instituted the action above mentioned in California, based on the contract and the Minnesota judgment; that James resumed the payments as ordered and continued making payments until his death. The trial court found, touching upon Hilda's ability to pay the premiums, "that Hilda * * * has at all times been ready, willing and able to pay the premiums * * * upon the receipt of the said policies." The court further found that "the Property Settlement Agreement between [deceased and Hilda] * * * has never been modified, rescinded, revoked or cancelled. That James R. Birkelund died * * * on April 25, 1942 * * *; that after November 26, 1931, and before the death of James R. Birkelund, Ruth Lillian Birkelund paid premiums on the policy * * * in the total sum of $271.20. That at the time of the death of James R. Birkelund, there became due and payable under the terms of said policy * * * the sum of $4378.79."

From the facts found the court concluded "That by the terms of the property settlement agreement between [deceased and Hilda] * * *, Hilda Birkelund became the irrevocable beneficiary of the policies of insurance covered by said agreement and acquired a vested interest in each of said policies to the extent of the face value thereof. That the notice of change of beneficiary [to Lillian] * * * was ineffective for any purpose because by the property settlement agreement * * * James R. Birkelund has lost all rights in said policies including the right to change the beneficiary. That the property settlement agreement * * * was in full force and effect at the time of the death of James R. Birkelund. That the claims of Ruth Lillian Birkelund to the proceeds of the insurance policies are without right except as to a lien for the amount of the premiums paid thereon by her. That Ruth Lillian Birkelund is entitled to judgment for $271.20 less the costs of Hilda Olsen Birkelund, and * * * is entitled to a lien against the proceeds of said policy for payment of the sum of $271.20 less said costs. * * * That Hilda Olsen Birkelund is entitled to judgment for the balance" of the proceeds of the policy "in the sum of $4107.49." Judgment was entered accordingly.

As previously indicated each claimant relies, either wholly or in part, on equitable principles, although Lilllian pleaded only her asserted legal claim. At the trial Hilda, through her counsel, stated her theories for recovery as follows: "The first theory is that she denies that she ever signed the document of April, 1930, whereby the right to change beneficiary was restored to Mr. Birkelund. The second theory is that the policy which is the subject of the suit is one of the policies which was given to her by the property settlement agreement, and she is entitled to the proceeds thereof, having been given the policy, and there was nothing left for the deceased to give to anyone else. The third theory is that she and James R. Birkelund were husband and wife and that any premiums paid on the policy from his earnings in California were the community property of Hilda Birkelund and James R. Birkelund and that thereby she would be entitled to a pro rata distribution of some portion of the policy, the proof undoubtedly will show."

Upon ample evidence the trial court resolved the issue of fact on the first theory against Hilda, finding that she had joined with James in executing the document of April 23, 1930, which restored to the policy the provisions giving the insured the right to change the beneficiary. On the third theory, the court held, and apparently properly, that any curtesy, dower or community rights which Hilda might otherwise have had in the policy by reason of premium payments by James during his marriage to Hilda, were merged in the property settlement agreement. This leaves the second theory—that by the property settlement agreement she became entitled to the proceeds of the policy—as the sole basis for the judgment in her favor. This theory, since the agreement to deliver was not actually performed, is essentially equitable in nature. Appellant Lillian attacks the judgment both on alleged weakness in the equitable showing made by Hilda and on asserted legal and equitable strength in her own (Lillian's) position.

[1, 2] It is to be noted first that apparently the trial court did not undertake to determine whether by the agreement "to deliver" the policy to Hilda it was intended that upon such delivery she should become merely an irrevocable *beneficiary* of the policy or should become its *assignee* and complete owner. "[T]here is a vast difference between the assignee of the insured and a mere beneficiary in a life insurance policy. The rights of the owner of a policy and those of a beneficiary are essentially different." (Mutual Benefit Life Ins. Co. v. Clark (1927), 81 Cal.App. 546, 554, 254 P. 306, 309.) A contract or irrevocable beneficiary has some, but not necessarily all, of the rights of an assignee. An ordinary beneficiary of a life policy has merely an expectancy of an incomplete and inchoate gift which is revocable at the will of the insured (Blethen v. Pacific Mut. Life Ins. Co. (1926), 198 Cal. 91, 98, 243 P. 431) while a contract beneficiary has a vested right *in the proceeds of the policy*. The rule as to contract beneficiaries is stated in Vance on Insurance, pages 591, 592: "Thus, where a member of such an association [mutual benefit] agrees that he will secure a certificate for the benefit of a person who promises to pay all dues necessary to maintain that certificate, the insured will not then be allowed to ignore his contract obligation and change the beneficiary thus selected, nor when the designation was in pursuance of an antenuptial contract or other binding agreement. The same rule applies where, after issuance of the certificate, the beneficiary promises to pay, and pays, the premiums under a contract whereby the member promises that she shall have the benefit of the insurance. Such a contract beneficiary, it seems, has not any vested legal right in the certificate, but is rather protected by the doctrine of estoppel, for, even though the insured may have the legal power to change the beneficiary, equity will hold him estopped to do so in violation of his contract." But "the contract beneficiary who has failed to give the consideration promised is in no position to claim protection of her equitable rights beyond the measure of her performance." (Id., p. 592, n. 1; see, also, Eatman v. Eatman (Tex.Civ.App., 1911), 135 S.W. 165, 167; Modern Brotherhood of America v. Hudson (1916), 194 Mich. 124, 160 N.W. 406, 409.)

Respondent calls our attention to such cases as Shoudy v. Shoudy (1921), 55 Cal. App. 344, 203 P. 433; Mutual Life Ins. Co. of New York v. Henes (1935), 8 Cal.App.2d 306, 47 P.2d 513; Mutual Life Ins. Co. of New York v. Franck (1935), 9 Cal.App. 2d 528, 50 P.2d 480; Chilwell v. Chilwell (1940), 40 Cal.App.2d 550, 105 P.2d 122; Mahony v. Crocker (1943), 58 Cal.App.2d 196, 136 P.2d 810. In each of those cases it was held that under the circumstances there present the insured had lost the right, by reason of an agreement entered into by him to change the beneficiary of the involved policy. In each of those cases, however, there was either an agreement on the part of the insured to maintain the insurance or else an agreement for delivery of the policy followed by actual delivery thereof to the person asserting the claim. Neither of such circumstances is here present. It is undoubtedly true that the execution of the settlement contract by Hilda constituted consideration for the agreement by James to "deliver" the policy to her. Her agreement to pay the ensuing premiums may have been a part of the consideration flowing to James. It will be remembered that the policy provided for the payment of $50 a month to James in the event he became totally and permanently disabled, If by delivery of the policy to Hilda it was intended merely to constitute her the irrevocable beneficiary of the policy James would still have retained the right to receive the indemnity payments in the event he became disabled. If, on the other hand, to "deliver" the policy to Hilda meant to *assign* the policy to her, then she was to become the complete owner of it and the indemnity payments, if they ever accrued, would also belong to her. Likewise, it is to be remembered that the two daughters of James were named as secondary beneficiaries and it may well have been in the mind of James that he desired the premiums paid by Hilda out of the monthly payments he was to make to her, because, for a time at least, he wanted the protection maintained for the daughters and felt that he would be unable, personally, to continue paying the premiums because of the amount he agreed to pay Hilda. But notwithstanding the fact that there was ample consideration for James' agreement to "deliver" the policy, whether that meant to constitute Hilda the irrevocable beneficiary or to assign the whole policy to her, it does not necessarily follow, in the light of the findings and the facts of this case, that Hilda is entitled to all the proceeds of the policy less only the premiums found to have been directly paid by Lillian.

[3] The findings of the court leave it uncertain as to what was the intention of the parties and the effect of their acts. If the effect of the agreement was to constitute Hilda a contract or irrevocable beneficiary her recovery, as previously indicated, may be limited in equity by her failure to perform the executory portion of the agreement. By the agreement she was entitled to receive the policy with the premiums paid for the year 1931. That was all that James undertook to deliver. Hilda's neglect to pay the ensuing premiums and her leaving of the policy in the possession of James with at least the apparent right to change the beneficiary should, under the circumstances shown here, be deemed to constitute a consent that he change the beneficiary insofar as values might be added to the policy by the payment of future accruing premiums. (Any theory that James and Lillian paid the premiums for the benefit of Hilda is effectively negated by the fact that Lillian was named as beneficiary.)

[4] Likewise, even if the findings of the court can be construed as determining that the intention of the parties was to effect an agreement for assignment of the policy, we still view the findings as inadequate to support the judgment to the extent that it awards Hilda such portion of the value of the policy as is represented by premiums which she agreed to, but did not, pay. The agreement to "deliver" the policy can be at most an unexecuted agreement to assign operating as an equitable assignment of the proceeds rather than of the policy itself. (45 C.J.S. Insurance, p. 43, § 420; Chilwell v. Chilwell (1940), supra, 40 Cal.App.2d 550, 553, 105 P.2d 122. Hence it appears that although Hilda might, during the lifetime of James, have maintained an action at law against James on the settlement contract for the recovery of the policy, her claim here for the proceeds is essentially equitable in nature. It is asserted not against James but against Lillian, who on any theory of the case, has acquired intervening rights of some nature and to some extent.

The pleadings of the respective claimants, particularly those of Lillian, fall far short of defining the theories which they invoke in their briefs. Nothing in the pleadings of Lillian can be construed as alleging a claim based on estoppel or laches.

Hilda's answer to the complaint alleges the facts showing her relationship to James and the transactions in regard to the property settlement and the insurance policy. Such answer, by itself and by reference to the complaint in interpleader, discloses the agreement to "deliver" the policy to Hilda, that it was not delivered, that Lillian was designated as primary beneficiary on December 20, 1932, by endorsement on the policy, that Hilda agreed to pay the premiums subsequent to 1931 and, inferentially, that she did not pay them, that the premiums were paid by someone, and that the policy remained in the hands of James or Lillian until James' death. It fails to allege with certainty whether Hilda claims the rights of a contract beneficiary or those of an assignee; likewise it fails to allege any offer on her part to pay the premiums, any demand for possession of the policy or any excusing circumstances for permitting the policy to remain in the hands of James or Lillian, without action on her part, for the approximately eleven years which elapsed between the making of the settlement agreement and James' death.

[5-7] Hilda contends that neither the doctrine of estoppel nor of laches can be operative as against her because of Lillian's failure to plead any such defense. It is true that the general rule is that one who relies upon estoppel or laches as a defense must plead facts constituting such estoppel or laches where, as here, there is an opportunity to do so (see Lucci v. United Credit & Collection Co. (1934), 220 Cal. 492, 497, 31 P.2d 369; Victor Oil Co. v. Drum (1920), 184 Cal. 226, 243, 193 P. 243; Mahana v. Echo Publishing Co. (1919), 181 Cal. 233, 236, 183 P. 800; Newhall v. Hatch (1901), 134 Cal. 269, 273, 66 P. 266, 55 L.R.A. 673), but, as recognized in the Victor Oil Co. case, supra, such rule does not apply where the facts appear on the face of the adversary's pleading. It is also true that "Mere delay in commencing an equitable proceeding without a showing of inequitable conduct or prejudice suffered thereby is not sufficient to bar the action" (Brownrigg v. DeFrees (1925), 196 Cal. 534, 538, 238 P. 714, 715) and that the averments above epitomized do not contain any allegation that Lillian parted with value in reliance upon her designation as beneficiary or her possession of the policy. But it does appear that there has been a change in circumstances and in the value of the property. Lillian and James did enter into a contract of marriage (this is alleged in the answer of Lillian and admittedly was known to Hilda at least as early as 1937) and, whether such marriage was valid or invalid, did live together as husband and wife; Lillian was named in 1932 as the primary beneficiary of the policy; premiums for some ten or eleven years were paid on the policy, adding to its value; and James is now deceased and not available as a witness to testify to the circumstances surrounding the change of beneficiary and the payment of premiums. The court specifically found that Lillian directly paid a portion ($271.20) of those premiums. We think, therefore, that while Lillian chose by her pleadings to stand upon her legal claim as the named beneficiary of the policy, this is a proper case in which to allow Hilda no more than the measure of her own performance of the contract upon which she bases her claim in equity. In other words, while Lillian has failed to plead and prove, and the findings do not establish, such equities in her favor as would deprive Hilda of all rights to the policy or its proceeds, Hilda, by her own case, has established an equitable right to recover only that which James agreed to deliver to her—the policy with premiums paid for the year 1931. The proportionate distribution of the proceeds effected by this conclusion saves Lillian all that she has established any right to have either on her legal claim or on any equitable theory available to her.

From the findings and undisputed evidence it appears that the premiums on the policy in question were payable semi-annually, on February 2 and August 2 of each year; that by the terms of the property settlement agreement between James and Hilda the latter agreed to pay the premiums falling due "subsequent to the year 1931"; that from the date of issue of the policy (February 2, 1921) through the year 1931, twenty-two semi-annual premiums had been paid, and thereafter and prior to James' death (on April 25, 1942) James and Lillian paid twenty-one additional semi-annual premiums; i.e., a total of forty-three premiums were paid on the policy during the life of James.

Therefore, in accordance with the views expressed above, the judgment is modified by striking out the provisions relating to a refund of premiums to Ruth Lillian Birkelund and to the payment of costs therefrom, and is further modified to provide that Hilda Olsen Birkelund shall recover 22/43 of the net proceeds of the policy and that Ruth Lillian Birkelund shall recover 21/43 of such proceeds, each claimant to recover from the other her legal costs, if any, in the trial court, such legal costs to be ascertained upon the entry of this modified judgment by proceedings as upon an original entry of judgment. As so modified, the judgment is affirmed, appellant to have her costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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29 Cal.2d 321

PEOPLE v. BOB.

Cr. 4722.

Supreme Court of California, in Bank.

Dec. 3, 1946.

1. Criminal law 🔑508(1)

In prosecution for murder based on killing during a robbery, statement of alleged accomplice, which was in accordance with defendant's confession except for assertion that defendant struck the lethal blow, was not admissible under any exception to hearsay rule.

2. Criminal law 🔑1036(9)

Where error in admission of evidence was conceded by prosecution, it thereby waived any claim to the insufficiency of defendant's objection to evidence in court below.

3. Criminal law 🔑1030(1)

If adverse party does not oppose consideration of a question for want of objection in trial court, point may be considered waived on ground that appellate court is not bound on its own motion to invoke rule requiring objections to be made in court below.

4. Criminal law 🔑695(4)

Where proper ground of objection to evidence sought to be introduced by prosecution would have been that it was hearsay, and it was manifest that, although the word "hearsay" was not used in giving grounds of objections, the whole tenor of them was plainly directed to that ground, defendant's objections were sufficient.

5. Criminal law 🔑419(1)

The essence of the hearsay rule is that witness is not in court and subject to cross-examination and is not available for jury to judge his credibility.

6. Criminal law 🔑695(2, 6)

Notwithstanding rule that specific ground for an objection must be given and particular portion of evidence which is inadmissible must be pointed out where other parts are admissible, technicalities should be liberally viewed when urged against a defendant in a criminal case, and mere fact that objection could have been made in better form will not justify refusal to conisider it where defendant's intention could not be misunderstood.

7. Criminal law 🔑1030(1)

Where it is evident from discussion over an objection between trial court and defendant's counsel that another ground of objection perfectly obvious from nature of question would have been overruled if made, such ground would be considered on appeal.

8. Criminal law 🔑695(6)

Fact that defendant admitted truth of portion of statement of alleged accomplice sought to be introduced by prosecution did not render entire statement admissible in face of defendant's objection on ground that it constituted hearsay.

9. Criminal law ⚷1169(7)

In prosecution for murder based on killing during a robbery, where hearsay statement of an accomplice improperly admitted over defendant's objection was only evidence that defendant inflicted fatal blows on victim, and accomplice's punishment was fixed at a separate trial at only life imprisonment while defendant was sentenced to pay the extreme penalty, admission of hearsay statement constituted prejudicial error.

10. Criminal law ⚷1134(1)

In view of declared policy of statute providing for an automatic appeal to Supreme Court in criminal cases wherein death penalty is imposed, and fact known to Supreme Court that many capital cases are defended by inexperienced counsel appointed by court, Supreme Court should take a liberal view of technical rules applicable to criminal cases generally, and examine record with view of determining whether in light of all that transpired at trial of the case a miscarriage of justice has resulted. Pen.Code, § 1239.

SHENK, EDMONDS, and SPENCE, JJ., dissenting.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Leroy Bob was convicted of murder of the first degree, and an appeal was automatically taken in his behalf under Pen. Code, § 1239.

Reversed.

L. A. Mills, of Stockton, for appellant.

Robert W. Kenny, Atty. Gen., James O. Reavis, Deputy Atty. Gen., and Chester E, Watson, Dist. Atty., and Bradford M. Crittenden, Deputy Dist. Atty., both of Stockton, for respondent.

CARTER, Justice.

Defendant Bob has been adjudged guilty of the crime of murder of the first degree and sentenced to pay the extreme penalty. His appeal is automatically before this court by virtue of the provisions of section 1239 of the Penal Code.

After his arrest Bob told the officers freely of the circumstances leading to the homicide, and at the trial he repeated his story on the witness stand.

It appears that in the early evening of November 16, 1945, Bob and an acquaintance named Johnson met in a pool hall in Stockton and decided to go out "hustling," which in the vernacular means "to roll a drunk, strong-arm somebody." According to the testimony of Bob, they walked by the Elks Club, where Johnson went in a doorway and picked up a piece of iron pipe. The two then continued walking until they noticed a Japanese man across the street talking to a boy. Johnson intruded upon this conversation and found that the Japanese, George S. Yoshioka, who had served in the United States Army, was inquiring where he could find some girls. Johnson stated that he knew where girls were to be found. He and Yoshioka and Bob walked down the street. They paused near a hotel on South Center Street, and then rounded the corner of the building into a vacant lot. Bob stayed a few feet away. Johnson and Yoshioka talked awhile and then Johnson suddenly hit Yoshioka on the head with the iron pipe, repeating the blows until unconsciousness resulted. Bob went through Yoshioka's pockets and extracted a wallet. Johnson took Yoshioka's wrist watch.

Bob and Johnson then went to the hotel room of Johnson's wife, where Johnson proceeded to clean up and prepared to flee the state. The sum of $37, found in the wallet, was divided equally by the two men. Johnson also found a $50 bill which he did not mention to Bob. Bob went back into the street, met one Simmons, and told him of the crime. He and Simmons returned to Yoshioka and Simmons took Yoshioka's shoes. Soon thereafter Yoshioka's body was observed by a passer-by, and the police were notified. Yoshioka passed away in the hospital without regaining consciousness, the cause of death being a fractured skull. The bloodstained pipe was found on the ground near the spot where Yoshioka's head had rested, but its rusty surface gave forth no fingerprints.

Johnson was taken into custody in Texas and returned to California. On December 1, 1945, in the early morning, Bob was arrested for "causing trouble" in a cafe, and was booked as a suspect vagrant. When the police took him to the fingerprinting desk, he there saw Johnson. This led to his voluntary confession of complicity in the robbery and murder of Yoshioka. He was questioned by an assistant district attorney in the presence of police officers and a court reporter, and the entire conversation was reduced to writing. Johnson was then brought in, and in the presence of the same officers and of Bob, his statement was taken in the same manner. It differed from the statement of Bob in this: That whereas Bob accused Johnson of being the man who picked up the pipe, lured the Japanese to the lot, and struck the fatal blows, Johnson claimed that he was the bystander and that it was Bob who procured the pipe, talked and walked with the victim, and then killed him. At the close of the questioning of Johnson, Bob stated that it was Johnson who used the pipe. A colloquy then ensued between Johnson and Bob, wherein each made accusations against the other. This was also reduced to writing and together with Johnson's statement was read in evidence.

[1-3] The two men were tried separately. On the trial of Bob his confession to the police was introduced in evidence. Johnson's statement contained the assertion that Bob struck the lethal blow. As above stated, that was denied by Bob. The balance of the statement was in accordance with Bob's confession and he did not deny it. Under those circumstances Johnson's statement was clearly hearsay evidence and was not admissible under any exception to the hearsay rule. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. The error in the admission of that evidence, especially the part to the effect that Johnson struck the deadly blow is conceded by the prosecution, hence it has waived any claim to the sufficiency of defendant's objection to the evidence in the court below. "If the adverse party does not oppose the consideration of a question for want of an objection in the trial court, the point will often be considered waived, on the ground that the appellate court is not bound on its own motion to invoke the rule requiring objection to be made in the court below." 4 C.J.S., Appeal and Error, § 245.

[4, 5] Moreover, under all the circumstances defendant's objection was sufficient. The record shows that when Johnson's statement was offered, defendant's counsel stated: "We object to any statement made by Johnson." Later defendant's counsel stated: "I believe *that Johnson could be brought here as a witness* and I renew my objection to this statement *inasmuch as he can be produced, and should be produced, to make his own statement before the jury* rather than relying upon his statement that was made some time ago, and his statement having been transcribed, the best evidence is from the lips of the witness, *let the jury see him and determine from his attitude* before the jury whether or not he is speaking the truth. This is certainly secondary evidence." [Emphasis added.] The court stressed the point (justifying its ruling of admissibility) after both objections, and on other occasions, that *if the statement was made in the presence of defendant it would be admissible.* After the court made such remarks following the last mentioned objection, defendant's counsel stated: "This [referring to Johnson's statement made out of court] is not a judicial proceeding. It's an ex parte affair, and *we have a right to have him produced,* and that evidence certainly might be of very much greater advantage to the jury *in determining whether he is speaking the truth* than merely the recital of a statement that's been reduced to writing by somebody else." [Emphasis added.] The proper ground of objection to the evidence would have been that it was hearsay, and ordinarily that ground should be specified in the objection, but it is manifest that although the word "hearsay" was not used in giving the grounds of the objections, the whole tenor

of them was plainly directed to that ground. The essence of the hearsay rule is that the witness is not in court and subject to cross-examination and is not available for the jury to judge his credibility. Those were the very things urged by defendant's counsel. That the court understood that the objection was grounded in hearsay is evidenced by its remarks about the presence of defendant when the statements were made. It is many times erroneously assumed that the mere presence of the other party when a statement is made will erase its hearsay character. The presence of the other party is ordinarily no test. It becomes important only when the statement is offered for the purpose of showing an admission of guilt by defendant. It is apparent from the remarks of the court that even if hearsay (using that word) had been specified as the ground of the objection the trial court would have overruled it. It is true that the particular mischievous part of Johnson's statement (that Bob rather than he struck the blow) was not pointed out by defendant's objection but it is clear from the attitude and expressed view of the court that it would have overruled even a specific objection.

[6, 7] In the light of the rules applicable to the necessity of making objections to evidence in the trial court to save the point on appeal, the objections made should be held to state sufficiently the ground of the objection and the part of the evidence to which objection was made. Notwithstanding the rule that the specific ground for an objection must be given and the particular portion of evidence which is inadmissible must be pointed out where other parts are admissible, "technicalities should be liberally viewed when urged against a defendant in a criminal case. And the mere fact that the objection could have been made in better form will not justify a refusal to consider it, where the intention of the defendant could not be misunderstood. So also if it is evident from the discussion over an objection between the court and counsel that another ground of objection perfectly obvious from the nature of the question, would have been overruled if made, this ground will be considered on appeal." 8 Cal.Jur. 503. See People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Shattuck, 109 Cal. 673, 42 P. 315; People v. Yee Fook Din, 106 Cal. 163, 39 P. 530; People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28; People v. Converse, 28 Cal. App. 687, 153 P. 734. It is said in People v. Yee Fook Din, supra, 106 Cal. at page 166, 39 P. at page 531: "Appellant could certainly have made his objections in better form, and could thus have brought here a record presenting his point in a clearer light; but *technicalities should be liberally viewed when urged against a defendant in a criminal case*." [Emphasis added.] It is aptly said in People v. Converse, supra, 28 Cal.App at page 691, 153 P. at page 736, where the objection of immaterial matter rather than *hearsay* was held sufficient: "It will not do to say that the ruling complained of was free from error because counsel for the defendant did not see fit to object specially upon the ground that the question called for testimony which in addition to being immaterial was incompetent because hearsay. Objections to questions calling for inadmissible testimony are designed and are required for the purpose of directing the attention of the trial court and of opposing counsel to the particular vice of the testimony sought to be elicited by the question; and it is the general rule that the efficacy of an objection is dependant upon the precision with which it is made. In the present case, however, *upon its face the character of the question must have fully apprized the trial court of the hearsay nature of the testimony called for; and it is evident by the discussion of the objection indulged in between the court and counsel that an objection upon the ground of hearsay would have been overruled* upon the theory that, notwithstanding its hearsay character, such testimony was admissible upon redirect examination as a material and undisclosed portion of a conversation called for and narrated upon cross-examination. Obviously therefore it would have been useless to have specified incompetency as an additional ground of objection; and this

perhaps was one of the reasons why counsel for defendant failed to do so." [Emphasis added.] In People v. Boggess, supra, 194 Cal. at page 232, 228 P. at page 456, it is said: "While it is true ordinarily that an objection to evidence must be sufficiently specific to inform the court of the scope of the objection, nevertheless, where the record shows, as it does in the instant case, that all the parties, including the court must have understood the purpose of the objection, it will not be said that the objection failed of its purpose." Such is equally true in the case at bar. The court said in People v. Darby, supra, 64 Cal.App.2d at page 33, 148 P.2d at page 32: "We do not feel inclined to deprive defendant of his right to demand that he be tried with competent evidence because of the oversight of his counsel in the midst of a difficult trial to remember that he should add the word, hearsay, to the statement of his objection."

[8] Viewing what transpired in the trial court at the time the Johnson statement was offered in evidence in the light of the foregoing authorities, there is little foundation for the contention that no proper objection was made to the portion of the Johnson statement which was denied by the defendant, on the specific ground that said statement was not admissible as an accusatory statement because of such denial, and that the trial court was not required to segregate the portions of the statement which might have been excluded, and was never given an opportunity or called upon to rule on the question presented for the first time on appeal. While the objection could have been more specific, we think it was sufficient to call to the attention of the trial court the inadmissible character of the portion of Johnson's statement which was denied by defendant, and the trial court should have excluded that portion of said statement. The fact that defendant admitted the truth of a portion of Johnson's statement did not render the entire statement admissible in the face of the objection.

[9] At the time of the crime here involved, defendant was only nineteen years of age. From the evidence here adduced (other than the objectional evidence) it seems more probable that Johnson, who participated with defendant in the commission of the crime, struck the blows which caused the death of Yoshioka. Johnson was tried separately and a jury, after finding him guilty of murder of the first degree, fixed his punishment at life imprisonment. Johnson was several years older than the defendant, and it could be inferred that he was the master mind in conspiring to commit as well as execute the commission of the crime. It cannot be doubted that the error in admitting in evidence the hearsay statement of Johnson was prejudicial to defendant in view of the fact that Johnson's punishment was fixed at life imprisonment and the defendant's punishment was fixed at death. In fact the vital issue, and the only one over which there could be any controversy, was whether defendant should be imprisoned for life or suffer the death penalty. His participation in the commission of the crime was admitted by him. And since the murder was committed in the perpetration of a robbery, it cannot be denied that it was murder of the first degree. But the jury might well have fixed defendant's punishment at life imprisonment had the hearsay declaration of Johnson not been admitted in evidence. This declaration placed before the jury the only statement that defendant struck the blows which caused Yoshioka's death. Since the only other evidence shows that it was Johnson and not defendant who struck the fatal blows, and Johnson's punishment was fixed at only life imprisonment, we are unable to escape the conclusion that the admission in evidence of the hearsay statement of Johnson was error, that such error was prejudicial and that defendant should be granted a new trial.

[10] The Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed by the trial court, by providing for an automatic appeal to the Supreme Court of this state in all such cases (Pen.Code, § 1239) and enjoining

upon this court an examination of the record and the preparation of a formal opinion and decision from which it should appear that no miscarriage of justice has resulted. In view of this declared policy, and the fact known to this court that many capital cases are defended by counsel appointed by the court who may be inexperienced in the handling of criminal cases, it would seem appropriate for this court to take a liberal view of the technical rules applicable to criminal cases generally (see People v. Yee Fook Din, supra, 106 Cal. at page 166, 39 P. 530) and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted.

The judgment and order denying a new trial are reversed.

GIBSON, C. J., and TRAYNOR, and SCHAUER, JJ., concurred.

SHENK, Justice (dissenting).

I dissent.

The judgment of reversal is placed on the tenuous ground that there was prejudicial error in admitting in evidence those portions of Johnson's lengthy statement which contained declarations accusing defendant of wielding the lethal weapon because at the conclusion of Johnson's statement Bob denied being the leading actor in this atrocious drama participated in by both men. The circumstances attending the felonious killing were freely related and admitted by Bob except as noted. Thus the sole ground for discovery of error is the introduction in evidence of the denied accusations by Johnson made in the presence of Bob that the latter procured and wielded the weapon.

The two men were tried separately. On the trial of Bob his confession to the police was introduced in evidence. Johnson's statement made in the presence of Bob was also read, together with the colloquy between the two men. No ground of objection to the admission of the statement was at first specified. Counsel merely stated, "We object to any statement made by Johnson." The court then asked the witness (who reported the conversations), "Well, was it in the presence of the defendant?", and, upon receiving an affirmative reply, stated, "Very well. The objection is overruled." See Code Civ.Proc., § 1870, subd. 3. After the reading of the Johnson statement was commenced defense counsel interposed an objection upon the ground that Johnson should be brought in as a witness and that the reading of his prior transcribed statement was not the best evidence. In overruling the objection on this ground the court said: "Any statement he [Johnson] made that was not made in the presence of this defendant would certainly not be admissible. This is a statement, a conversation, in the presence of the defendant in which the defendant took part. * * *"

On oral argument in this court Bob's counsel again contended that the Johnson statement was inadmissible on the ground that Johnson was in the county jail and could have been called as a witness.

There is no indication in the record that any declaration of Johnson was objected to on the ground that it was denied by Bob. See People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, and cases therein cited; 8 Cal.Jur. p. 102, § 196; 20 Am.Jur. p. 483, § 570. Most of Johnson's declarations were admissible even over any objection by reason of not having been denied. Bob's statement disclosed participation with Johnson in the commission of the crime. He corroborated most of the incriminatory accusations made against him by Johnson and some of them he expressly admitted. The possibility of the rejection of a portion of the Johnson statement because it contained the accusations that Bob enticed the victim and struck the fatal blow, which Bob denied, was not brought to the attention of the trial court. There was no objection on that ground, no motion to strike, and no request for an instruction that the jury disregard the accusations which Bob denied, namely, the declarations that Bob lured the victim and wielded the lethal weapon. The trial court was not required on its own motion to segregrate the portions of the statement which might have been excluded by appropriate objection from the clearly admissible portions. The trial court was never given the opportunity or called upon to rule on the question now presented for the first time on appeal.

The question whether some portion of the Johnson statement might have been excluded, had timely objection been made, is not a question for consideration on this appeal. It is the law that a reviewing court will not consider an objection to the admission of evidence unless the ground of the objection has been specified in the trial court. People v. Schafer, 161 Cal. 573, 578, 579, 119 P. 920; People v. Farmer, 77 Cal. 1, 7, 18 P. 800; People v. Duran, 57 Cal.App.2d 363, 370, 134 P.2d 305; People v. Wignall, 125 Cal.App. 465, 474, 475, 13 P.2d 995; People v. Jones, 12 Cal.App. 129, 132, 106 P. 724; 8 Cal.Jur. p. 503, § 517. Therefore, despite the concession of the attorney general to the contrary, there was no error in the trial court's ruling on the admission of the statement.

By his own confession Bob was a participant in an atrocious murder committed in the course of robbery of the victim. This could only be murder of the first degree (Pen.Code, § 189). The record conclusively establishes Bob's guilt as to that degree of murder. His guilt is established regardless of which of the two men struck the fatal blow. People v. Whitson, 25 Cal.2d 593, 154 P.2d 867; People v. Gomez, 209 Cal. 296, 298, 299, 286 P. 998; People v. Arnold, 199 Cal. 471, 250 P. 168; People v. Matthew, 194 Cal. 273, 278, 279, 228 P. 424; People v. Bringhurst, 192 Cal. 748, 221 P. 897; 4 Cal.Jur. 10-Yr.Supp. p. 557, § 39.

No extenuating circumstance is shown. Bob admitted that he and Johnson started out with the intention to "roll" someone, that he knew Johnson had the pipe, and that he "figured" Johnson would use it. Each declared that no other person was involved in the affair. Regardless of which did the actual killing, they were the only persons responsible for the perpetration of the crime. Assuming that Johnson completed the killing Bob took part in it and in the robbery of the fatally wounded victim which ensued. Not only that but a short time afterward Bob returned to the scene and although the victim was still alive witnessed without remonstrance the taking of the murdered man's shoes by Simmons.

On the evidence the jury would have not been justified in returning any verdict than that of murder of the first degree.

The jury was properly instructed with reference to its duties and responsibilities and to its right, in its discretion, to relieve this defendant of the extreme penalty. This the jury chose not to do. The fact that the confederate Johnson was so relieved on a separate trial and before another jury does not establish a miscarriage of justice in Bob's case. It is impossible to say what prejudices, because of the innocent victim's Japanese ancestry, may have crept into the jury box in Johnson's case to influence a verdict of imprisonment for life in that case. It is a matter of common report that at the time of the trial and because of the hostilities between our country and Japan this prejudice was so pronounced that juries in other cases rendered verdicts of not guilty for no apparent reason or excuse except that the victims were of the Japanese race. The innocent victim in this case was an ex-serviceman who had been wounded in active service in France as a member of the Armed Forces of the United States. It is obvious that no prejudice against him because of his race had any influence on the jury's action in the present case.

The judgment should be affirmed.

EDMONDS and SPENCE, JJ., concurred.

77 Cal.App.2d 255

PEOPLE v. CASAS et al.

Cr. 4070.

District Court of Appeal, Second District,
Division 2, California.
Dec. 12, 1946.

1. Criminal law ⚷1144(13)

On appeal by defendant from a conviction, evidence was viewed in the light most favorable to the people.

2. Criminal law ⚷260(11)

In prosecution for unlawful possession of opium tried by court, whether defendant knew that a jar found in defendant's possession contained opium was for trial court. Health and Safety Code, § 11500.

3. Poisons ⚷9

Evidence sustained conviction for unlawful possession of opium. Health and Safety Code, § 11500.

4. Poisons ⚷9

In prosecution for unlawful possession of opium, concealment by defendant on defendant's person at time of arrest of a jar containing opium gave rise to an inference that defendant had a guilty knowledge of the contents of the jar. Health and Safety Code, § 11500.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Manuel Cases, Jessie Casas, and another were prosecuted for an offense and second-named defendant was convicted of unlawful possession of opium, and she appeals.

Judgment affirmed.

Max Solomon, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating Section 11500 of the Health and Safety Code (unlawful possession of opium), after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying her motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent) and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

On April 11, 1946, defendant Jessie Casas, who admittedly had used narcotics on occasions, was found in a room with four other people. The police gained entrance to the room by forcing open the door. After the police entered the room, there fell from a sweater or jacket of a woman occupant, other than defendant, a case containing hypodermic needles. Thereupon the officers took all parties out of the room and placed them in a police car. The police car was driven to Lincoln Heights station, and after the persons had been removed from the police car two jars of opium were found in it. The police told defendant that they were going to have her searched by a police matron; whereupon she stated that if she had anything she might as well give it to them. She then took from her brassiere a jar containing gum opium. Defendant stated that she had gone to the room in which she had been arrested to see her husband with whom she was not living; that they had gone to dinner and returned to the room about 11:30 just before the police officers knocked. She also said that her husband, one of the occupants of the room, had put the jar in her brassiere upon hearing the knock at the door. Defendant disclaimed any knowledge of the contents of the jar.

Defendant urges reversal of the judgment on this proposition:

There is not any substantial evidence to sustain the implied finding of the trial court that defendant knew that the contents of the jar placed in her clothing by her husband was opium.

[2] This proposition is untenable. It was a question of fact for determination of the trial court from all of the evidence as

to whether defendant knew that the jar in her possession contained opium. (People v. Gory, 28 Cal.2d 450, 170 P.2d 433.)

[3, 4] In view of the evidence set forth above, the trial court was fully justified in drawing the inference that defendant knew that the jar that her husband had given her contained opium. According to her own admissions she had on several occasions used narcotics with her husband. The fact that she concealed the jar also gave rise to the inference that she had a guilty knowledge of its contents. (People v. Gory, supra.)

People v. Bledsoe, 75 Cal.App.2d 862, 171 P.2d 950, relied on by defendant, is factually distinguishable from this case. In the cited case the evidence wholly failed to show defendant's knowledge of the presence of marihuana in his car, it being conceded that defendant's automobile in such case, in which the drug was found, was used by others in the perpetration of a robbery in a different city from that in which defendant lived and that defendant had not used his car since it had been returned.

Since the record is free from error the judgment and order should be affirmed.

It is so ordered.

MOORE, P. J., and WILSON, J., concur.

77 Cal.App.2d 368

LUNT et al. v. BORIS et al.

Civ. 12985.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1946.

Appeal and error 🔑**1152**

In action to recover possession of realty under provisions of trust deed, executed to plaintiffs by defendant's grantors, after default in payment of purchase money note secured thereby, judgment directing plaintiffs to clear property of all liens and encumbrances, including prior trust deed and second mortgage, on payment to plaintiffs of amount of note, should be modified on appeal by further ordering plaintiffs to deliver possession of realty back to defendants on their performance of all conditions required to be performed by them.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Minor R. Lunt and another against Rose Boris and another to recover possession of realty under provisions of a trust deed after default in payment of a note secured thereby, in which defendants filed a cross-complaint to quiet title to the realty. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed as modified.

William Steinberg, of San Francisco, for appellants.

Crist & Beene, of Palo Alto, for respondents.

GOODELL, Justice.

The respondents sued to establish their right to the possession of real property under the provisions of a deed of trust after a default. The appellants filed a cross-complaint to quiet their title against the respondents and others. From a judgment awarding respondents possession and that appellants should take nothing by their cross-complaint this appeal was taken.

On January 2, 1942 respondents were the owners of a piece of improved real property in Soledad, 160 feet by 290 feet in area, known as the Soledad Auto Court. It was subject to a deed of trust securing an indebtedness of $15,000. to the Salinas National Bank. It was subject also to a second mortgage or deed of trust securing an indebtedness of approximately $9,000. to one Pagels. On that day respondents conveyed the property to Palo Alto Building Company, pursuant to an earlier agreement, for the price of $28,000. No money payment was made or intended. The vendee took title subject to said $15,000. deed of trust and to said $9,000. second mortgage and executed a deed of trust to the vendors securing a promissory note for the remaining $13,000. By the earlier agreement the vendee had undertaken to assume, as part of the purchase price, certain outstanding obligations, but this undertaking became integrated in the $13,000. secured note just mentioned.

The last mentioned deed of trust from the vendee, Palo Alto Building Company, to the vendors, respondents herein, was dated January 2, 1942, and was given to secure said note for $13,000., due on January 2, 1943, bearing interest at 6% per annum. This deed of trust covered the auto court property and included also two parcels of land wholly separate from the auto court and not involved herein. Up to the entry of judgment no payment on principal or interest had been made on the $13,000. note, hence there was clearly a default, as the court found.

The court found that the deed of trust just discussed provides that in case of "a default in the payment of any sums agreed to be paid by said note, then the plaintiffs could enter into and upon said property and take possession thereof, operate, manage and control said property and conduct any business thereon, and perform such acts as might be necessary or proper to conserve the value thereof, and collect and receive the income therefrom." It was to establish and enforce this right to possession that this suit was brought. The prayer of the complaint asks for nothing beyond that except counsel fees.

On July 1, 1942, Palo Alto Building Company conveyed the auto court property to the appellants Gibson Boris and Rose Boris who entered into possession. The court found that no consideration passed on this transaction; also that the Boris grantees took title subject to the bank's first deed of trust securing the $15,000. and that they took with knowledge that the second ($13,000.) deed of trust, which had not then been recorded, had been given by their grantor, Palo Alto Building Company, to the respondents. There is ample evidence to support this finding for William J. McKillop, president of Palo Alto Building Company, testified that he told Rose Boris "the whole story, and the obligations against the property, $15,000. to the bank and $13,000. for this deed of trust" and his testimony was not contradicted.

The only controversy arises from the facts (1st) that the Pagels mortgage or deed of trust securing approximately $9,000. remains unsatisfied of record (junior, of course, to the first deed of trust for $15,000. held by the bank) and (2nd) that the $13,000. deed of trust, given by Palo Alto Building Company to the Lunts is outstanding at the same time. The appellants contend that the discharge of record of the Pagels $9,000. lien (which respondents agreed to cause to be cleared) is a condition precedent to any obligation resting on them to pay the $13,000. obligation. The respondents to the contrary contend that their obligation to clear off the Pagels' lien will arise only when the $13,000. is paid. The evidence indicates that it was contemplated by the parties before these appellants ever came into the picture that the Pagels $9,000. second mortgage or deed of trust was to be paid off out of the $13,000. for which Palo Alto Building Company gave the deed of trust.

With respect to this dilemma counsel for the respondents stated to the court that "There is no argument that this $13,000. deed of trust is a duplication of the other deed of trust, and that is what I want to stipulate, if they will only stipulate they had knowledge of the $13,000. deed of trust, which also includes the Pagels deed of trust * * * and the Court can make its order that then we are to pay the Pagels deed of trust and any other liens of record at the time * * * [meaning at the time the Lunts conveyed to Palo Alto Building Company]. Now, we are willing to do that. I want to stipulate to that". This evoked from the court the observation: "Is not that a square deal, I should think it was".

This offer of counsel was adopted for in the judgment there will be found a provision for the clearing off of certain liens (which would include the Pagels lien) when the $13,000. note is paid.

It must be borne in mind that this is purely a possessory action, and no question of foreclosure is at all involved. The respondents brought this suit for possession because there had been a default in the payment of the $13,000. note and they invoked the provision of the deed of trust which entitled them to possession in such event. In this case the only issues were (1st) whether there had been such default, and (2nd) whether the appellants had, or were chargeable with, knowledge, actual or constructive, that the $13,000. deed of trust had been given by their predecessor. Notwithstanding the purely possessory character of the action and its narrow issues, the court made a declaration of the rights and duties of the parties, particularly with respect to the obligation of the respondents to clear off the Pagels lien whenever the $13,000. is paid. The appellants urge, however, that the judgment should be clarified so as to set forth their right to repossession when the $13,000. obligation is paid. In this connection it should be observed that the court has found, "That defendants own said fee subject to said deeds of trust executed for the benefit of Salinas National Bank and plaintiffs."

That part of the judgment which, as we have said, is declaratory of the rights and duties of the parties, reads as follows: "That upon the payment to plaintiffs of Thirteen Thousand Dollars ($13,000.00), with interest thereon at six per cent (6%) per annum from January 2, 1942, Three Hundred Fifty Dollars ($350.00) attorney's fees, such sums as might become due under the deed of trust securing such Thirteen Thousand Dollars ($13,000.00), and plaintiffs' costs herein, the plaintiffs shall clear said property of all liens and encumbrances, except taxes and assessments levied and/or assessed since January 2, 1942; conditions and restrictions affecting said property, if any; easements of record, if any; the deed of trust executed for the benefit of Salinas National Bank; and all liens and encumbrances placed on said property since January 2, 1942."

The following, if added thereto, will render more complete such declaration of rights and duties: "It is further ordered, adjudged and decreed that if and when the defendants Rose Boris and Gibson Boris perform all the conditions on their part to be performed as hereinabove set forth, said plaintiffs Minor R. Lunt and Nellie T. Lunt, and all persons holding by, through or under them, shall thereupon deliver back to said defendants the possession of the real property hereinabove described."

The trial court is directed to modify the judgment by adding thereto the provision last quoted. As so modified the judgment is affirmed, respondents to recover their costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.

In re GREEN'S ESTATE.

DICK v. ELLIS et al. *

Civ. 7258.

District Court of Appeal, Third District, California.

Dec. 13, 1946.

Rehearing Denied Jan. 13, 1947.

Hearing Granted Feb. 10, 1947.

1. Appeal and error 🔑1099(7)

Even though additional testimony witness gave in present trial might be thought to create a conflict with that at the former, that fact would be immaterial on question of legal sufficiency of evidence as a whole as found by both courts on the prior proceeding.

2. Appeal and error 🔑1099(7)

In determining whether evidence given at second trial is sufficiently similar to that given at first trial so that the law of the case applies, Court is not concerned with matters of credibility of witnesses or conflict in evidence.

3. Wills 🔑384

Where Supreme Court on former appeal ruled that evidence in will contest was sufficient to warrant a denial of proponents' motion for a judgment notwithstanding the verdict, and evidence on the second trial was substantially the same as that given at first trial, the law of the case applied in determining sufficiency of the evidence.

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* Dismissed Nov. 21, 1947.

4. Wills ⚿337

In will contest, evidence on issue of undue influence was of such a character as to make improper an order setting aside verdict for contestant.

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Proceeding in the matter of the estate of Robert Franklin Green, also known as Robert F. Green, also known as R. F. Green, deceased, wherein Frankie Green Dick contested the will offered for probate by Henry F. Ellis and others. From order granting proponents' motion for a judgment notwithstanding the verdict and judgment entered pursuant thereto, the contestant appeals.

Judgment and order reversed with direction.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, and Jack J. Miller, of Stockton, for appellant.

Warren H. Atherton, H. Raymond Hall, Bill L. Dozier, Gumpert & Mazzera, J. Calvert Snyder, and Darrah & Ellis, all of Stockton, for respondents.

PEEK, Justice.

This is the second appeal in the present controversy. In the first proceeding the jury returned a verdict in favor of contestant (appellant herein). Proponents' (respondents herein) motion for a judgment notwithstanding the verdict was denied but their motion for a new trial was granted. On appeal the action of the trial court was sustained (Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692). The cause was then retried and again the jury found for the contestant. Proponents again moved for a judgment notwithstanding the verdict, which motion was granted and the will admitted to probate. Contestant has again appealed, this time contending that the verdict of the jury is supported by substantial evidence, that the doctrine of the law of the case requires a reversal of the judgment and order admitting the will to probate, and that certain errors occurring during the course of the trial likewise compel a reversal. Our examination leads us to the same conclusion as that reached by the Supreme Court in the first appeal—that the trial court was not "justified in * * * granting a motion for judgment notwithstanding the verdict." Estate of Green, supra, 25 Cal.2d at page 546, 154 P.2d at page 698.

The present record, which is substantially the same as the one on the former appeal, discloses that the testator Robert Franklin Green died August 31, 1939 at the approximate age of 78 years, leaving surviving him a wife and only child, a daughter Frankie Green Dick, the contestant and appellant herein. Immediately following his marriage he left his wife and returned to the home of his mother and from that date until his death he never lived with his wife. The contestant was born September 28, 1904. Within three weeks thereafter her father and mother executed a property settlement agreement whereby the mother released him from all claim for maintenance and support and purported to release the rights of the daughter likewise. Upon the death of his mother in 1907, the decedent moved to, and thereafter until his death continued to live in, the home of a sister and brother-in-law, Loclice Maybelle and Henry F. Ellis, the parents of two of the beneficiaries named in decedent's will, Frances M. Freeman and Carrie C. Erich. Apparently three wills were executed by the testator, one dated November 30, 1928, one dated October 18, 1935, and one dated January 24, 1938. Although it is stated in appellant's opening brief that the last dated will was rejected because it was procured through the undue influence of Ellis, our examination of the record discloses nothing pertaining to said will or the alleged proceedings thereon as having been admitted in evidence (other than certain testimony received for purposes of impeachment) and that all allegations in contestant's pleadings in relation thereto were stricken by the trial court.

Nothing pertaining to the 1928 will is involved herein—the present controversy relates solely to the 1935 will.

Inasmuch as on the former hearing the trial court ruled that the evidence before it was sufficient to warrant a denial of proponents' motion for a judgment notwithstanding the verdict, and on appeal the Supreme Court (at page 546 of 25 Cal.2d at page 698 of 154 P.2d) as a matter of law so decided (Wells v. Lloyd, 21 Cal.2d 452, 455, 132 P.2d 471; Berry v. Maywood Mut. Water Co. No. One, 13 Cal.2d 185, 186, 88 P.2d 705; Estate of Baird, 193 Cal. 225, 236, 223 P. 974; Herbert v. Cassinelli, 73 Cal.App.2d 277, 166 P.2d 377), the first question to be considered is whether or not the evidence on which said ruling and decision were made is substantially the same as that now before us for review.

In the former trial, on the issue of undue influence, the court admitted in evidence a letter written by Henry Ellis, the brother-in-law, to one of decedent's nieces and her husband, suggesting that they induce the decedent to dispose of his property during his lifetime rather than subject it to a probable contest after his death. Initially Ellis had been made a party to these proceedings but secured his dismissal therefrom on the ground that he was not named as a beneficiary under the will. The court further ruled against the admission of any evidence to show that Ellis had been instrumental in procuring the execution of the 1938 will, mentioned above, which will previously was denied probate on the ground of undue influence exercised by him. See, 25 Cal.2d 543, 544, 154 P.2d 692.

The fact that on both trials verdicts were returned for the contestant, notwithstanding the inclusion of the Ellis letter in the evidence at the first trial and its exclusion from the evidence in the second, demonstrates that the second jury could not have considered it as a vital factor in reaching the same determination. Likewise it is apparent that in the former proceeding the letter was not deemed of controlling effect by either the trial or appellate court. To the contrary the judge in the previous trial, although admitting the letter in evidence, expressed the view in his written opinion that said letter was utterly without evidential value, and yet ruled that the evidence as a whole was such as to require a denial of the motion for judgment notwithstanding the verdict. On appeal the Supreme Court held that there was no error in such ruling in the light of the trial court's conclusion "as contained in the opinion rendered by him." In other words, as we understand the decision, the Supreme Court has in effect held that, following the opinion of the trial court and the rationale thereof and disregarding the letter altogether, the evidence as a whole was still sufficient to make improper an order for judgment notwithstanding the verdict.

The only other respect in which respondents claim the evidence on the issue of undue influence to be materially different in the present proceeding is in the matter of the testimony of contestant's mother, Rosa Green, the widow of the decedent. On the former trial Mrs. Green testified that the executor of the will, Ray E. Burson, when calling at her home the night before she signed the release affecting a parcel of property that stood in decedent's name, declared: "You might just as well sign; you don't get anything anyway." This testimony was given on the redirect examination of the witness, and was admitted on the ground that it was a declaration against interest. On the present trial the question which opened the way for such testimony was not asked and hence the testimony was not given.

It is difficult to see how the absence of this testimony could have affected the issues involved herein. There was no claim made, nor was the jury on either trial given to believe, that the executor was guilty of exercising undue influence over Mrs. Green or her daughter, contestant herein. Neither was this testimony essential on the question of knowledge, for in both trials it appeared that Burson had witnessed the 1928 will in which no provision was made for either Mrs. Green or her daughter and that the will now in controversy was substantially the same in these respects as said prior will. Likewise in both trials Burson testified that as late as 1933 he discussed with the decedent matters pertaining to the latter's affairs and property. Therefore, the testimony in question was merely cumulative and not a vital factor in the determination of the question of the legal sufficiency of the evidence.

On the issue of mental capacity the testimony of the physician, Dr. Rockhill, who was called by contestant, was stronger in favor of contestant on the present trial than it was on the former trial. With regard to his ultimate conclusions, proponents concede this to be true, but they contend that, in disclosing more fully the specific reasons on which his conclusions were based, the witness likewise disclosed their unwarranted character. They argue that such opinion testimony is no stronger than the facts or reasons on which it is predicated. Also they rely on a statement in Adams v. Thornton, 5 Cal.App. 455, 461, 90 P. 713, 715, that "The want of harmony in the testimony of a witness at two separate trials may of itself render inapplicable the doctrine of 'the law of the case.' "

[1] However, these contentions do not appear to be supported by the record. On the present trial the witness stated facts and gave reasons amply sufficient to sustain his conclusions which were entirely consistent with those given on the former trial. Therefore, even though the additional testimony he gave in the present trial might be thought to create a conflict with that given at the former, still that fact would be immaterial on the question of the legal sufficiency of the evidence as a whole as found by both courts on the prior proceeding. Pellett v. Sonotone Corp., 26 Cal.2d 705, 708, 160 P.2d 783, 160 A.L.R. 863.

[2] Proponents' further attack upon the testimony of this witness, on the ground that it is impeached by contradictory statements which another witness claimed he made, is without merit since we can not be concerned with matters of credibility of witnesses or conflict in the evidence in an inquiry of this kind.

The fourth and last ground upon which proponents predicate their argument that the rule of the law of the case has no application relates to the testimony of Mr. May, a business acquaintance of the decedent. In the present trial, after testifying generally concerning the physical condition of the decedent including his apparent feebleness and taciturnity, the witness, in reply to a question whether the deceased appeared to be of sound or unsound mind as he knew him at the time, replied: "Well, I would say he was of unsound mind." On the previous trial this witness when asked about the decedent's physical condition stated that "he didn't seem to be a man that could realize anything." Proponents now contend that the testimony of this witness at the present trial "is vastly weaker and substantially different than on the former trial."

[3] The record discloses that the evidentiary facts as testified to by the witness were virtually the same on both trials, and it is obvious that the quoted conclusions based thereon were not of such an essentially variant character as to warrant a departure from the law established in the former proceeding.

In urging a different determination from that established on the prior appeal, proponents cite England v. Hospital of the Good Samaritan, 14 Cal.2d 791, 97 P.2d 813. In that case it was held that if the applicable rule of law is altered or clarified in the interval between the first and second appeals, the court on the second appeal should decide the case according to the rule as altered or clarified. However, here as in the case of Wells v. Lloyd, supra, 21 Cal.2d at page 457, 132 P.2d at page 474, there is no question "* * * of change or clarification * * * but only of the effect of an appellate court's decision on the sufficiency of the evidence." Nor is it evident how injustice can result from the application of settled rules of procedure to the determination of the question of the validity of a purported testamentary disposition by a person of his property.

[4] Moreover, after a careful examination of all the evidence favorable to the case of contestant, as disclosed by the record before us, and independent of such prior adjudication, we are of the opinion that the evidence is of such a character as to make improper an order setting aside the verdict for contestant. See, Estate of Teel, 25 Cal.2d 520, 526, 527, 154 P.2d 384.

It follows from what we have said that our decision herein must be in conformity with that of the Supreme Court on the prior appeal. Therefore under all of the facts and circumstances presented in the present appeal it is our conclusion that the trial court herein was not, as we have previously stated, justified in granting a motion for judgment notwithstanding the verdict.

By virtue of the fact that the disposition we have made herein will have the effect of restoring the verdict of the jury and the entry of judgment accordingly, the contentions of appellant relative to the alleged errors of the trial court in refusing the admission of certain proffered evidence become wholly immaterial.

The judgment and order are reversed and the trial court is hereby directed to enter judgment in favor of contestant in accordance with the verdict of the jury.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 181

PEOPLE v. TANNER.

Cr. 2412.

District Court of Appeal, First District, Division 1, California.

Dec. 9, 1946.

1. Kidnapping ⇨5
Robbery ⇨24(1)

Evidence sustained conviction of robbery and kidnapping for the purpose of robbery.

2. Criminal law ⇨1159(4)

The credibility of witnesses is for the trier of the facts and appellate court cannot disturb a judgment based upon substantial evidence, even though such evidence may be contradicted. Code Civ.Proc. § 1844.

3. Criminal law ⇨200(1)

Conviction of robbery and of kidnapping for the purpose of robbery did not violate defendant's constitutional immunity from double jeopardy, though both offenses were committed in course of a continuous series of acts, since neither crime is necessarily included in the other.

4. Judges ⇨49(2)

Trial judge's statement to defendant at the time he waived a jury trial that judge would as soon have him tried by a jury and that defendant was conferring no favor on judge by asking for a court trial and court's comments in ruling on the evidence and in asking questions of witnesses disclosed no bias of trial judge against defendant.

5. Criminal law ⇨419(11)

In prosecution for robbery and kidnapping for purpose of robbery, testimony of a police officer as to contents of a conversation between officer, defendant and third person, which took place wholly in the presence of defendant, relating to whether defendant had used third party's automobile the night offense was committed was admissible.

6. Criminal law ⇨665(4)

That prosecuting witness remained in courtroom in contravention of order of court excluding other witnesses made while he, as first witness, was testifying did not affect the admissibility of his subsequent testimony in rebuttal, though it might affect his credibility as a witness.

7. Criminal law ⇨662(8)

The right to be confronted by witnesses against him may be waived by accused. Pen.Code, § 686.

8. Criminal law ⇨260(11)

Admission in evidence, with express consent of defense counsel of testimony given in police court after defendant's arrest by a witness who at time of trial was unavailable because in jail in another state and who at time of preliminary examination in police court was cross-examined by defense counsel was not prejudicial error in absence of showing that defendant was not present at preliminary examination. Pen.Code, § 686.

9. Criminal law ⚷257

Trial court did not err in rendering its decision finding defendant guilty of robbery and kidnapping for purpose of robbery immediately after argument without taking the case under submission, where case involved no complex law points but turned primarily upon the credibility of defendant and complaining witness.

◆

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Andrew Tanner was convicted of robbery and kidnapping for the purpose of robbery and from the order denying his motion for a new trial and from the judgment of conviction, he appeals.

Judgment and order affirmed.

Andrew Tanner, in pro. per.

Robert W. Kenny, Atty. Gen., and Mirian E. Wolff, Asst. Atty. Gen., for respondent.

PETERS, Presiding Justice.

Appellant was charged with robbery and kidnapping for the purpose of robbery. He was tried by the court without a jury and found guilty of both offenses. He appeals from the order denying his motion for a new trial and from the judgment of conviction. At the trial he was represented by the assistant public defender; on this appeal he appears in propria persona.

The testimony of the complaining witness, Layton D. Painter, amply supports the conviction. He testified that on November 13, 1945, he was living in Berkeley with his mother. He was then in the army, having suffered a concussion of the back and shrapnel wounds in the legs. On that evening he attended a movie in Oakland. After leaving the show he had a couple of drinks and between 11:00 and 11:30 p. m. he was walking north on Broadway between 13th and 14th Streets on the west side of the street. He testified that as he was walking near the curb a two-door Ford sedan in which the appellant was riding stopped; that appellant got out, grabbed him by the arm and pulled him into the automobile; that he was then pulled into the back seat over the front seat; that he tried to resist but, because of his physical condition, he could do little about it; that the appellant held him down by both arms on the back seat; that he could clearly see appellant; that at no time did he recognize the driver; that he was then taken to San Francisco; that the car did not stop until it reached a residential zone in San Francisco; that then appellant reached into his, Painter's, pocket and removed his wallet; that appellant took $81.00 in cash and a check for $67.88 from the wallet and returned the wallet to him; that this was done without his consent; that appellant then put him out of the car and the car drove off; that he took the license number.

On cross-examination he testified that no one else was on the sidewalk between 13th and 14th Streets on Broadway, on the west side, at the time in question; that he had never been across the Bay Bridge before; that he did not know if any automobiles passed them; that as he lay on his back he saw orange colored lights for ten or fifteen minutes; that he did not remember the car stopping to pay the toll; that after he was put out of the car he met two women who told him that he was on Mission Street and who directed him to a cigar store at 16th or 17th and Van Ness where he could telephone; that he called the San Francisco police from that store and a sergeant of police came down and gave him some money to get back to Oakland. It should be here noted that he did not tell the sergeant that he had been robbed, and no explanation appears as to why he did not do so. No witness was called from the San Francisco police department to verify his story. He further testified that after the sergeant gave him the money he proceeded to the Terminal where he caught an "A" train for Oakland; that it was then about 1:30 a. m.; that he got off in Oakland and walked home to where he lived; that he arrived home at somewhere around 3:00 a. m.; that his mother let him in. His mother fixed the time of his arrival at 4:00 a. m. Later, about noon, on November 14, 1945, he reported the incident to the Oakland police and gave the police the license number of the car. Several days later, after appellant had been arrested, Painter identified appellant in a police lineup as his assailant. According to Painter and to the police there were seven men, all colored, in the line-up. Appellant testified that he was the only one in the line-up with an overcoat, and that the police officer in charge ordered him by name to remove the overcoat in the presence of Painter. The police officer testified that he had appellant remove the overcoat before Painter was in the room, and that this order was given out of the hearing of Painter. This conflict was, of course, for the trial court to determine. At any rate, at the trial Painter positively identified appellant as the man who kidnapped and robbed him.

After Painter had testified, the deputy district attorney asked leave to introduce the police court testimony of one Jessie Freeman Alexander who was then unavailable, being then in jail in Houston, Texas. The Court twice asked counsel for appellant if there was any objection to reading this testimony. On the first occasion counsel stated: "No Your Honor, none whatever," and on the second occasion he stated: "I expect to impeach it in about eight different ways, Your Honor; they can put it in so I can impeach it. I welcome the chance." The portion of the testimony of this witness thus read into the record shows that appellant was represented by counsel at the preliminary hearing, and that his counsel fully cross-examined Alexander. Alexander's testimony was to the effect that he was the owner of the Ford sedan in question; that he knew appellant and had known him for about six months prior to November 13, 1945; that prior to that date he had, on occasion, loaned his car to appellant; that at about 10:00 p.m. on November 13th while he was in the company of his girl friend, Martha Brewer, he loaned the car to appellant and received $20 in return; that appellant returned the car at about 8:30 a.m. on the morning of November 14th; that at that time appellant came to his room, where he, Alexander, was still in the company of his girl friend, to return the keys; that appellant told him that he wanted him to pick up his wife and then go to court, and wanted Alexander to drive him down; that the appellant's wife refused to go with them; that they then drove to either 14th and Washington Streets or 3rd and Adeline Streets and appellant got out of the car; that this was about noon on the 14th. This witness testified that he had never seen Painter before until he saw him at the police line-up.

Alexander's testimony was contradicted in several respects by other witnesses. A court clerk testified that the records showed that appellant made a court appearance on November 15th on another charge, but that no appearance was made by him on the 14th. Martha Brewer testified that she knew both appellant and Alexander. She denied being in the company of Alexander on the evening of November 13th, and denied that she heard appellant ask Alexander for the use of his car on that date. She further denied that she and Alexander were in a room together on the morning of November 14th. She testified that, although she had been friendly with Alexander, she had nothing to do with him after November 10th.

A police inspector testified that Painter identified appellant in a police line-up of seven colored men on the morning of November 17, 1945, and that Alexander was also in that line-up. He contradicted appellant's version of the identification. He also testified that after Painter had identified appellant that appellant told him he had never seen Painter before in his life, and denied ever using Alexander's car. However, the next day, according to the officer, appellant told him an entirely different story. The story he then told, and which he also testified to at the trial, was as follows: That on the night of November 13th, he, the appellant, was gambling at a cafe in West Oakland; that he won some $600; that Alexander came into the cafe and told him that he had a soldier in his car and was going to San Francisco; that he wanted appellant to go; that appellant bought a pint of whiskey and proceeded to Alexander's car; that there he met Painter for the first time; that the three of them, with Alexander driving, proceeded to San Francisco; that there he bought some gas; that they drove to Post and Buchanan Streets and Alexander then told him to get out and drove away with Painter. At the trial he testified that Alexander and Painter left him in the car and walked away. At any rate, he told the officer, and at his trial testified, that he arrived, alone, at the Terminal and got a train to Oakland about 5 a.m. and proceeded back to the cafe; that he there saw Painter talking to a girl, drinking whiskey, and trying to cash a check. He denied participating in any robbery or kidnapping.

[1, 2] On this testimony the court found the appellant guilty on both counts of the information. On this appeal it is first urged that the judgment is unsupported by the evidence. The above recital of the evidence obviously refutes that contention. The trial court was entitled to disbelieve appellant's testimony and to believe that of Painter. People v. Rose, 26 Cal.App.2d 513, 79 P.2d 737; Code of Civil Procedure, § 1844. The credibility of the witnesses was for the trier of the fact. This court cannot disturb a judgment based upon substantial evidence, even though that evidence may be contradicted.

[3] It is next argued that robbery is an integral and required part of the kidnapping charge; that appellant cannot be lawfully charged and convicted of a robbery included within the kidnapping charge; that to do so subjects him to double jeopardy. The exact contention was decided adversely to appellant in People v. Simpson, 66 Cal.App.2d 319, 152 P.2d 339.

[4] The appellant next urges that the record shows bias and prejudice against him by the trial judge. In this connection he points to a statement of the trial judge made at the time he, the appellant, waived a jury trial. At that time the trial judge informed appellant of the two charges against him and stated: "These are two serious charges against you, and your lawyer has intimated to me you want to waive a trial by jury and be tried by the Court. Now, as far as I am concerned I would just as soon have you tried by a jury. You are not conferring any favor on me by asking for a court trial. If you want to waive a jury and have me try you I will give you as fair a trial as I know how. * * * You understand that? The defendant: Yes sir. The Court: You still want to be tried by the Judge? The defendant: Yes sir. The Court: You want me to try you and you waive a jury? The defendant: Yes sir. Mr. Shea: Counsel waives it." Far from showing any bias or prejudice the above statement indicates a very fair attitude on the part of the trial judge. He was very frank with appellant and his attitude is to be commended rather than criticised.

The other alleged indications of bias and prejudice relate to the court's comments on ruling on the evidence and in asking questions of the witnesses. We have read the entire record. We find no indication of any bias or prejudice on the part of the trial court. To the contrary, the record demonstrates that appellant was granted a fair trial. The various comments made and the questions asked by the trial judge were all justified by the circumstances of the case, and were made or asked in an attempt to get at the truth.

[5] Appellant particularly objects to the introduction into evidence of the testimony of a police officer of the contents of a conversation between the police officer, Alexander and appellant relating to whether appellant had used Alexander's car. Appellant's counsel objected to the testimony on the ground of incompetency and offered to stipulate that defendant, Alexander and Painter were all in the automobile on the night of November 13th. The court properly held that the conversation was admissible. Such conversation was wholly in the presence of appellant and referred to an important element of the case.

[6] The next point urged by the appellant is that the trial court committed prejudicial error in permitting Painter to testify in rebuttal although he remained in the courtroom in contravention of the order of the court excluding "the other witnesses" made while Painter, as the first witness, was on the stand. The violation of an exclusion order does not render the witness incompetent to testify, nor does it furnish grounds to refuse permission to testify. In fact, to refuse to permit such a witness to testify would be error. The witness who violates the order of exclusion may be guilty of reprehensible conduct, and such witness may be punishable by contempt, and such conduct may affect the

witness' credibility, but it does not affect the admissibility of the evidence. People v. Duane, 21 Cal.2d 71, 130 P.2d 123. While the Duane case involved a witness for the defense it is obvious that the rule must apply to either a prosecution or defense witness.

[7, 8] The next contention of appellant is that it was error to admit the police court testimony of the witness Alexander. As already pointed out in the recital of facts, this testimony was admitted with the consent, twice expressed, of appellant's counsel. The theory of appellant is that in spite of such consent the admission of this evidence was error because the record does not show that he was present in the police court when Alexander was examined. It is true that § 686 of the Penal Code provides that a defendant is entitled to be confronted with the witnesses against him except "That where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness" his preliminary examination may be read to the trial court in a proper case. It is true that the portion of the preliminary examination of Alexander here read into the record does not expressly show that appellant was personally present at that hearing, but it is equally true that it does not show that he was not present—in fact, all of the reasonable inferences are the other way. It is incumbent upon appellant to show error—this he has not done. The preliminary examination was on December 6, 1945. The record shows that appellant was arrested on November 17, 1945. Of even greater importance, the record shows that appellant's counsel cross-examined Alexander at length. Moreover, the right to be confronted by witnesses is one that may be waived by an accused. See cases collected 7 Cal.Jur. p. 930, § 76. Here there was an express waiver and consent by counsel for appellant. That is sufficient in most jurisdictions. See cases collected 14 Am.Jur. p. 897, § 188. No prejudicial error was committed in admitting this testimony.

[9] Appellant next contends that the trial court erred in not giving greater deliberation to the case. The record shows that immediately after argument the court rendered its decision. It is urged that failure to take the case under submission was error. The trial court is to be commended for its expedition. There were no complex law points involved. The case was tried in less than one day. The case turned primarily upon whether the appellant or the complaining witness was to be believed. The trial court undoubtedly made up its mind on the credibility of those two witnesses while they were testifying. This being so, the case was at an end. There was no need for further consideration.

None of the other contentions of appellant warrant discussion.

The judgment and order appealed from are affirmed.

WARD, J., and SCHOTTKY, J., pro tem., concur.

* * *

77 Cal.App.2d 252

PEOPLE v. CAROTHERS.

Cr. 4046.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1946.

1. Criminal law 🔑302(4), 878(3)

Dismissal of count in information for assault with deadly weapon on named person, with intent to kill him, and jury's verdicts of acquittal on counts charging previous assault on such person and assault on one of two policemen accompanying him, with intent to kill them, did not result in finding that defendant had no intent to murder such person or policeman, and hence did not bar conviction on count charging murder of other policeman on ground that evidence showed no specific intent to commit murder.

2. Criminal law ⚷878(3)

Each count in information or complaint, charging separate and distinct offenses, must stand on its own merits, and disposition of one count has no effect or bearing on jury's verdict respecting other counts, so that verdict of acquittal on one or more counts is not deemed acquittal on any other count. Pen.Code, § 954.

3. Homicide ⚷230

In prosecution for murder of policeman, defendant's testimony that when he shot deceased, he intended to kill another man, was sufficient to sustain jury's finding, implied from verdict of conviction, that defendant intended to commit murder when he fired fatal shot.

4. Criminal law ⚷1038(3)

Where instruction to jury on particular points is correct so far as it goes and only valid objection thereto is its inadequacy because of its generality, indefiniteness or incompleteness, error cannot be predicated on failure to give fuller, more complete, or explicit instructions on such points, in absence of proper request therefor by defendant.

5. Criminal law ⚷1038(3)

In murder prosecution, where trial court accurately instructed jury on general principles of self-defense, defendant, failing to request more specific instruction, waived any right to urge error on appeal because of trial court's failure to give defendant's requested instruction on justifiable homicide in defense of his dwelling or wife.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Ernest Carothers was convicted of murder in the second degree, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

Leola Buck Kellogg, of Los Angeles (Montgomery G. Rice, of Los Angeles, of counsel), for appellant.

McCOMB, Justice.

From a verdict of guilty of murder in the second degree after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

The evidence being viewed in the light most favorable to the People (respondent) and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

Defendant occupied, with his wife, a small sleeping apartment in a court containing several other houses. On the evening of December 21, 1945, defendant and Mr. White, an occupant of another dwelling in the court, engaged in an altercation which resulted in physical injury to Mr. White. After the fight, defendant returned to his sleeping apartment and Mr. White telephoned for the police. Four police officers arrived at the court. It was raining and the night was very dark. The officers and Mr. White went to a dwelling in the court numbered as 2324½ where two of the officers remained while the other two, accompanying Mr. White, went to the sleeping apartment of defendant. Officer Huseman, one of the police officers accompanying Mr. White, announced at the door of defendant's apartment "policeman" and then opened the door approximately twelve to sixteen inches; whereupon defendant fired a .45 caliber revolver, a bullet from which struck Officer Huseman. He died as a result of the wounds on December 31, 1945.

An information was filed by the district attorney against defendant charging him in four counts as follows:

1. Murder of one Huseman;

2. Assault with a deadly weapon committed on December 21, 1945, upon one White with the intent to kill White;

3. Assault with a deadly weapon committed on December 22, 1945, upon one White with the intent to kill White; and

4. Assault with a deadly weapon upon one Knapp with the intent to kill Knapp.

Upon motion of the People the third count was dismissed, and the jury found defendant not guilty on the second and fourth counts, but guilty of murder in the second degree on the first count.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder consecutively.

[1, 2] First: The dismissal of count three and the verdict of not guilty on counts two and four of necessity resulted in a finding that defendant had no intent to murder Mr. White, or assault Officer Knapp with an attempt to murder; therefore the evidence failed to show any specific intent to commit murder which would sustain defendant's conviction on count one.

This proposition is untenable and is governed by this rule:

Each count in an information or complaint which charges a separate and distinct offense must stand upon its own merit and the disposition of one count has no effect or bearing upon the verdict with respect to other counts contained in the information or complaint. Hence a verdict of acquittal of one or more counts is not deeemed to be an acquittal of any other count. Penal Code, sec. 954; People v. Guerrero, 22 Cal.2d 183, 190, 137 P.2d 21; People v. Amick, 20 Cal.2d 247, 252 et seq., 125 P.2d 25; People v. Kirsch, 204 Cal. 599, 604, 269 P. 447.

[3] Clearly each count in the complaint stated a separate and distinct offense; therefore the foregoing rule is applicable, and since defendant testified that when he shot he intended to kill Mr. White, there is substantial evidence to sustain the jury's implied finding that defendant intended to commit murder when he fired the shot which hit Officer Huseman causing his death.

[4, 5] Second: The trial court committed prejudicial error in not reading to the jury an instruction on justifiable homicide in defense of defendant's dwelling or his wife.

This proposition is likewise without merit. Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction. People v. Bryant, 77 Cal.App. 375, 246 P. 815; State v. Acosta, 49 Nev. 184, 242 P. 316, 319; People v. Droste, 160 Mich. 66, 125 N.W. 87, 93; State v. Lathrop, 112 Wash. 560, 192 P. 950.

In the present case the trial court accurately instructed the jury upon the general principles of self-defense. Had defendant desired a more specific instruction, he should have made a request therefor. This he did not do, and therefore under the rule above stated he has waived any right to urge error in this court because of the alleged failure of the trial court to give a more specific instruction upon the doctrine of self-defense.

In view of the fact that no error appears in the record, the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

77 Cal.App.2d 244

PEOPLE v. AHSBAHS.

Cr. 4037.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1946.

1. Criminal law 🔑741(1), 742(1)

The weight of conflicting evidence and credibility of witnesses are for jury.

2. Criminal law 🔑1159(3)

Verdict based on conflicting evidence will not be set aside if there is substantial evidence supporting it.

3. Criminal law 🔑1144(13)

An appellate court will view the evidence in light most favorable to the prosecution.

4. Infants 🔑20

Evidence sustained conviction of commiting a lewd and lascivious act upon thirteen year old girl. Pen.Code, § 288.

5. Criminal law 🔑1044

If accused's counsel did not desire to have accused's voluntary statements regarding former sojourn in jail stand in the record against accused a motion to strike the answer should have been made, and failure to make such motion waived the right to urge the error on appeal.

6. Criminal law 🔑1036(1)

Accused making no objection to question at trial waives the objection and cannot make such objection for first time on appeal.

7. Criminal law 🔑1137(5)

Accused could not complain of admission of evidence regarding other offenses, where information as to former offenses came from accused without inquiry from prosecution and there was no attempt to degrade accused by showing particular acts of misconduct or prior bad character.

8. Criminal law 🔑1043(1), 1045

Accused could not complain of admission of testimony where there were only two objections and first objection did not state a ground on which it was based and accused did not obtain a ruling thereon, and second objection was sustained.

9. Criminal law 🔑825(1)

When instructions given contain concise and fair statement of the applicable law and accused desires further instructions, he is not prejudiced by failure to give instructions which accused failed to propose.

10. Criminal law 🔑772(2)

The court need not define every word found in a statute denouncing a crime.

11. Criminal law 🔑772(2)

Where offense of committing a lewd and lascivious act upon girl was sufficiently described in information which was read to jury, was adequately narrated in the evidence and was characterized in instructions given, instructions were not erroneous for failure to define the words "lewd" and "lascivious". Penal Code, § 288.

12. Criminal law 🔑768(1)

In prosecution for committing a lewd and lascivious act upon thirteen year old girl, instruction was not erroneous on ground that last sentence, which told jury that fact that charge was difficult to disprove should not deter jury from convicting accused if jury were convinced from evidence beyond reasonable doubt of accused's guilt, weakened or detracted from first portion of instruction in which jury were told to examine with caution testimony of prosecuting witness. Pen.Code, § 288.

13. Criminal law 🔑829(1)

A requested instruction which was merely a repetition in different language of that which was contained in instructions given was properly refused.

14. Criminal law 🔑1162

An error requiring reversal of judgment of conviction must appear from the record to have been prejudicial and to have caused substantial injury and that a different result would have been probable if the error had not occurred.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Orville Ahsbahs was convicted of committing a lewd and lascivious act upon a girl, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Laughlin E. Waters, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with the violation of section 288 of the Penal Code in that he committed a lewd and lascivious act upon a girl thirteen years of age, "by then and there touching, rubbing, fondling and feeling the body, members and private parts thereof of" the prosecutrix "with intent then and there of arousing, appealing to and gratifying the lusts, passions and sexual desires of" the prosecutrix and appellant. At the time of his arraignment he entered a plea of guilty and applied for probation. Thereafter his application for probation was denied and he was sentenced to the state prison. Some time later, upon motion of his attorney, his plea of guilty was vacated and he entered a plea of not guilty.[1] He was tried by a jury and was convicted and again sentenced to the state prison. His motion for a new trial was denied. He has appealed from the judgment and from the order denying the motion for a new trial.

As grounds for his appeal appellant contends that the verdict is contrary to the evidence, that the court committed errors in the admission of evidence and erred in the instructions to the jury.

1. The sufficiency of the evidence. Appellant resided with his family, consisting of his wife, two sons and a stepdaughter. The prosecutrix resided with her sister-in-law in the same block in which appellant and his family resided. On the night in question, appellant's stepdaughter, with the consent of her mother, invited the prosecutrix to spend the night at appellant's house where she arrived about 8 o'clock. The two girls occupied the same bed, appellant's stepdaughter being next to the wall, and the prosecutrix on the outside. Some time after they had retired, appellant came into the girls' room and tickled each of them while they were in bed. Appellant then left the room, returning after an absence of a few minutes when he sat on the side of the bed and committed the act complained of. Appellant's wife came into the room stating that she knew what was going on. Appellant and his wife went into the living room and the latter called the prosecutrix and asked what had happened. After the prosecutrix had related what had occurred, appellant's wife, her daughter and the prosecutrix went to the latter's home, and all of them, with the sister-in-law of the prosecutrix, returned. During this time the prosecutrix was crying. Her sister-in-law asked what had happened. Appellant said that he would let the girl tell her story and then he would tell his. After the prosecutrix had related what appellant had done the latter refused to make any statement and the sister-in-law called the police. Upon arrival of the officers the prosecutrix, in the presence of the other persons, began to relate what had transpired. The officers took her and her sister-in-law into the kitchen where she completed her statement. They all returned to the living room and one of the officers asked appellant why he had acted in such a manner, to which he replied: "She asked for it. She asked for what she got."

The evidence of the prosecutrix was corroborated by her sister-in-law as to those matters that occurred in her presence. The latter also testified that when she arrived at appellant's house he was lying on the sofa and that his trousers were unbuttoned; that he arose, went into the bathroom, returned and buttoned his trousers. The officers corroborated the evidence of the prosecutrix as to what occurred after they arrived. One of them testified that appellant said that he wanted to telephone to his attorney, and that while they were taking him to jail he said that he would get a good attorney and "beat this rap."

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[1] This order was made subsequently to the entry of judgment sentencing appellant to the state prison. Section 1018 of the Penal Code provides that a plea of guilty may be withdrawn before judgment. The record does not show that the judgment was vacated before the plea of not guilty was entered, or at all. No question as to the regularity of the proceedings in this particular has been raised by respondent and we have given no consideration to the validity of the withdrawal of the plea of guilty or to the jurisdiction of the court to place appellant on trial.

Appellant testifying in his own behalf, admitted that he sat at the foot of the bed which the girls occupied but denied that he committed any lewd or lascivious acts upon the prosecutrix. Appellant's wife testified that when she came into the room the bed clothing did not appear to be disarranged, that her husband was sitting on the bed on top of the covers, and that his hands were in his lap. She denied having made any remark to the effect that she knew what her husband was doing. Appellant's stepdaughter corroborated the evidence of appellant and that of his wife and stated that she did not see him touch the prosecutrix.

[1-4] It is clear, as conceded by appellant in his brief, that the evidence for the prosecution is not of the type that can be deemed inherently improbable. When there is a conflict in the evidence it devolves upon the jury to determine its weight and which witnesses should be believed. When the verdict is based on conflicting evidence it will not be set aside if there is substantial evidence supporting it. People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402; People v. Thourwald, 46 Cal.App. 261, 265, 189 P. 124. An appellate court will view the evidence in the light most favorable to the prosecution. People v. Ogden, 41 Cal.App.2d 447, 449, 107 P.2d 50. A perusal of the record demonstrates the substantiality of the evidence and the correctness of the verdict.

2. Alleged errors of law occurring at the trial. Appellant was a witness in his own behalf. The following questions and answers are quoted from his cross-examination and are assigned as error:

"Q. When was it you first said you had nothing to say; you wanted to talk to your attorney? A. When the officer told me he was taking me in.

"Q. At that time you didn't know what 288 was. Why did you want to talk to an attorney? A. Because I happen to know that while you are in the County Jail you can't use a telephone.

"Q. You can't use a telephone after you are in the County Jail? A. That is right.

"Q. How many times have you been in the County Jail. A. Once or twice.

"Q. You know, as a matter of law, that every prisoner has a legal right to call an attorney?

"Mrs. Kellogg: I object to that.

"Mr. Myers: He just stated that, if the Court please.

"Q. Do you know that or do you not. A. You can make one call out of the booking office and that is all.

"Q. That is a legal right, isn't it? A. That is what the statement says up there. If you don't happen to have the nickel to make the phone call, you don't make the phone call.

"Q. You are sure of that? A. Positive.

"Q. Have you ever tried to make a call from the jail and the officers refused to let you make it?

"Mrs. Kellogg: Object to that as immaterial.

"Mr. Myers: If the Court please, these are voluntary statements.

"The Court: I don't see that it tends to prove or disprove any of the issues, Mr. Myers.

"Mr. Myers: Very well."

[5-7] Appellant contends that the court erred in allowing the admission of the testimony above quoted for the reason that it placed before the jury evidence of other offenses of the accused. There are two answers to this contention: (1) The information as to appellant's former encounters with the law came from him without inquiry from the prosecution. The district attorney's question related to appellant's reason for wanting an attorney, and did not suggest or anticipate an answer indicating that he had previously been in the county jail. There was no attempt to impeach or degrade the witness by showing particular acts of misconduct or prior bad character. Appellant's answer showing

that he had knowledge of the rules and procedure of the jail was voluntary. The succeeding questions propounded to him ensued naturally from the witness's unsolicited disclosure. The ignominy, if any, suffered by appellant, resulted from his own freely given statements and not from any act or conduct of the district attorney. (2) There were only two objections to the questions. The first objection did not state a ground on which it was based and appellant did not obtain a ruling on it. The second objection was sustained. If a defendant makes no objection to a question at the trial it is waived and cannot be made for the first time on appeal. People v. Washburn, 104 Cal.App. 662, 665, 286 P. 711; People v. Thourwald, 46 Cal.App. 261, 270, 189 P. 124; People v. Godwin, 123 Cal. 374, 376, 55 P. 1059. If appellant's counsel did not desire to have his voluntary statements stand in the record against him a motion to strike the answer should have been made, and a failure to make the motion, like the failure to object to a question, waived the right to urge the error on appeal. People v. Cole, 141 Cal. 88, 92, 74 P. 547.

[8, 9] 3. No error is found in the instructions to the jury. The appellant's contention that error was committed in the instructions is no less attenuated than is his complaint concerning the admission of evidence. His objection that the court failed to give certain instructions that would have been supplementary to those given is disposed of by the fact that he failed to request them. When the instructions given by the court contain a concise and fair statement of the law applicable to the case and a defendant desires further instructions, he is not prejudiced by reason of the failure of the court to give the instructions which he himself failed to propose. People v. Bryant, 77 Cal.App. 375, 377, 246 P. 815; State v. Acosta, 49 Nev. 184, 242 P. 316, 319; People v. Droste, 160 Mich. 66, 125 N.W. 87, 93; State v. Lathrop, 112 Wash. 560, 192 P. 950, 951.

The court instructed the jury that a violation of section 288 of the Penal Code consists of the act of "touching or fondling, plus a specific intent to arouse, appeal to or gratify the lust, passions or sexual desires of either the accused, or the alleged victim." The jury was further instructed that to constitute the offense it was not necessary that the bare skin of the minor be touched, but that the touching, fondling, rubbing or feeling of the body, members or private parts through the clothing of the minor constituted the offense charged.

[10, 11] Appellant does not object to the form of these instructions, but complains that the court did not go further and define the words "lewd" and "lascivious". It is not necessary to define to the jury every word found in a statute denouncing a crime. It may be conceded that members of a jury have a less intimate knowledge of such a crime as that charged against appellant than have the prosecuting officers and counsel who engage in the defense of such actions, but the words "lewd" and "lascivious" are in sufficiently common usage that it is not essential that a lexicographer's definition be read to the jury. It would be redundant to tell the jury that Webster says that "lewd" means "lustful, unchaste" and that "lascivious" means "lewd, lustful." The court was not required to instruct that appellant's acts were lewd and lascivious. The offense charged is sufficiently described in the information that was read to the jury and it is adequately narrated in the evidence and characterized in the instructions given.

[12] The court instructed the jury as follows: "By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove, I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove should not deter you from rendering a verdict of guilty in the event that you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged." The first sentence of this instruction fulfills the requirement for the giving of a cautionary instruction in sex cases. People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102,

130 A.L.R. 1485. Appellant complains of the last sentence in the instruction in which the jury was told that the fact that the charge is difficult to disprove should not deter them from finding appellant guilty if they were convinced from the evidence beyond a reasonable doubt of his guilt. This sentence did not weaken, modify or detract from that portion of the instruction in which they were told to examine with caution the testimony of the prosecuting witness. The two portions of the instruction are not opposed to each other and the last sentence does not neutralize the first. By the language complained of the court did not indicate any opinion of its own as to the guilt or innocence of appellant, but in fact it emphasized the duty of the jury to be convinced beyond a reasonable doubt before returning a verdict of guilty. This instruction is identical with one that was approved in People v. Arechiga, 72 Cal. App.2d 238, 240, 164 P.2d 503, 504, as "An accurate statement of the law of this state on the subject," and is substantially the same as that in People v. Currie, 16 Cal. App. 731, 736, 117 P. 941, 943, concerning which it is there said: "We think the court went far enough in its cautionary signal to the jury to awaken in their minds the importance of carefully scrutinizing the testimony of the prosecuting witness, especially so, as the court stated the law to be, which defendant does not question, that a conviction could be found on the uncorroborated testimony of the prosecuting witness."

[13, 14] Appellant assigns as error the refusal of the court to give the following instruction which he requested: "You are instructed that a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. The law does not require in this character of a case that the prosecution witness be corroborated but does require that you examine her testimony with caution." The language of this proposed instruction adds nothing to the instruction given by the court and quoted above. It is merely a repetition in different language of that which is contained in other instructions given by the court. "* * * Before a judgment may be reversed because of error it must appear from the record that it was prejudicial and caused substantial injury and that a different result would have been probable if the error had not occurred." People v. Lucas, 16 Cal.2d 178, 182, 105 P.2d 102, 104, 130 A.L.R. 1485.

The judgment and the order denying appellant's motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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77 Cal.App.2d 162

RODRIGUEZ et al. v. SAVAGE TRANSP. CO. et al. (two cases).

Civ. 13147.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1946.

1. Appeal and error 🔑989

The power of an appellate court begins and ends with a determination as to whether the findings are supported by substantial evidence, contradicted or uncontradicted, or by reasonable inferences from that evidence.

2. Negligence 🔑136(25)

The question of proximate cause is normally one of fact for the trier of facts.

3. Automobiles 🔑244(12, 35, 36, 37)

Evidence that each truck driver was following the truck immediately preceding him too closely and at too great a speed, that first driver slowed suddenly without signalling when truck ahead slowed down, and that second driver to avoid collision with first driver's truck, swerved to left and collided head-on with plaintiff's approaching automobile, justified inference that both truck drivers were guilty of negligence, which negligence concurrred to proximately cause the head-on collision. Vehicle Code, §§ 531(a, b), 544(c).

4. Automobiles ⚿245(65)

Where negligence of first truck driver in failing to signal when he slowed down suddenly, having followed a preceding truck too closely at too high a speed, continued up until moment of collision, negligence of second truck driver, who was following first driver's truck too closely and at too high a speed, in turning to left to avoid collision with first driver's truck and thereby colliding head-on with plaintiffs' automobile when he could have turned onto right shoulder, was not such an intervening act that as a matter of law broke chain of causation with respect to first driver's negligence. Vehicle Code, §§ 531 (a, b), 544(c).

5. Negligence ⚿62(3), 136(25)

An independent act of negligence that will break the chain of causation must be so disconnected in time and nature to make it plain that damage was not a natural or probable consequence of original wrong or omission, and where question is reasonably debatable, issue is not one of law but of fact for trier of fact.

6. Negligence ⚿61(1)

The mere fact that one of two concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other, for the negligence complained of need not be the sole cause of the injury, and it is enough to show that it is a "proximate concurring cause," that is, one that is so efficient in causation that, but for it, injury would not have occurred.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Miguel Rodriguez and Victoria Rodriguez and a separate action by Consuelo Rodriguez and Rudolfo Rodriguez, by their guardian ad litem, Miguel Rodriguez, respectively against Savage Transportation Co., William R. Phillips, Coast Line Truck Service, Inc., and Orville Seaton to recover for the death of one of the Rodriguez' children and injuries by the minor plaintiffs in a collision between the Rodriguez' automobile and a truck of the defendant Savage Transportation Company driven by defendant Phillips. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco (Richard A. Boyd, of San Francisco, of counsel), for appellants Savage Trans. Co. and William R. Phillips.

William C. Theile, of Salinas, and Cooley, Crowley, Gaither & Dana, of San Francisco, for appellants Seaton and Coast Line Truck Service, Inc.

Anthony Brazil, of Salinas, for respondents.

PETERS, Presiding Justice.

The plaintiffs filed two actions against the Savage Transportation Co. and its truck driver Phillips, and the Coast Line Truck Service, Inc. and its truck driver Seaton, for damages for personal injuries, property damage and for the death of a minor child growing out of an accident alleged to have been caused by the negligence of defendants. The actions were consolidated for trial and tried before the court without a jury. The trial court found that the drivers of both trucks were negligent, that their negligence was concurrent, and that such concurrent negligence proximately caused the accident, and entered its judgments accordingly. From these judgments both sets of defendants appeal, each claiming that the accident was proximately caused by the negligence of the other, and that the evidence shows, as a matter of law, that it was not negligent. On these appeals no contention is or could be made that the plaintiffs were guilty of contributory negligence. No charge is made that the judgments are excessive. There is no merit in either appeal.

The accident occurred on June 5, 1945, at about 7:30 a.m. about three miles south of Salinas on highway 101, one of the main north-south highways. At the scene of the collision the highway is straight, is paved, has two lanes and runs north and south. It is about twenty feet wide and has the usual white line down the center.

It has a six-foot shoulder on the east side, and a fourteen-foot eight-inch shoulder on the west. On the morning of the accident the weather was clear and the highway was dry.

The Rodriguez family was proceeding south on this highway, on their own side of the white line, at about a speed of twenty-five miles per hour in a Chevrolet sedan. The two trucks involved were proceeding north, one behind the other, when the truck of the Savage Transportation Co. driven by Phillips admittedly cut across from the east to the west side of the highway and ran into the automobile in which the plaintiffs were riding. The collision occurred on the western edge of the highway. As a result of the accident one of the children, Marguerita by name, was killed, both parents suffered serious injuries, two of the other children were hurt, and the Chevrolet sedan was demolished.

Just prior to the accident there were five large trucks proceeding northerly toward Salinas, each on its own or east side of the highway. The first two trucks belonged to the Baker Company. That company is not a party to these actions. The third truck belonged to the defendant Coast Line Truck Service, Inc., and was being driven by defendant Seaton. The fourth truck was owned by the Savage Transportation Co. and was being driven by the defendant Phillips. The fifth truck also belonged to the Savage Transportation Co. and was being driven by one Collier. The two trucks here involved, the trucks being driven by Seaton and Phillips, were large equipment and were heavily loaded. Seaton was driving a Kenworth tractor and semi-trailer with a gross weight of about 66,000 pounds, while Phillips was driving a Western Diesel truck and semi-trailer with a gross weight of about 55,000 pounds. Seaton's truck was equipped with a mechanical arm signal.

The evidence shows that just prior to the accident the second Baker truck was proceeding north at about 40 miles per hour and about 300 feet behind the first Baker truck. Seaton was following the second Baker truck at a distance of about 60 or 70 feet. He, too, was proceeding at about 40 miles per hour. Phillips was following the Seaton truck at about a distance of 50 feet and going about 45 miles per hour. Trailing Phillips at about 400 feet was the other Savage truck.

Both Seaton and Phillips testified that the reason they were so close to the truck directly in front of them was that each had intended to pass the truck in front, and when they were prevented from doing so by oncoming vehicles, they closed up to these distances.

The driver of the second Baker truck testified that he observed Seaton trying to pass and warned him by a flicker of his lights that there was not a proper clearance; that Seaton then fell in behind him about 100 feet and remained there for about two blocks; that he was then going about 40 miles per hour; that the driver of the first Baker truck then slowed up, and he had to put on his brakes pretty hard and slowed down to about 25 or 30 miles per hour; that he did not signal his intention to slow down because he did not have time to do so; that at no time did he slow down to below 25 or 30 miles per hour.

Seaton testified that the second Baker truck was going about 40 miles per hour when he, Seaton, swung to the left to see if he could pass; that he saw a car approaching and swung back in line; that he put on his brakes and intended to slow down; that the Baker truck started to slow down rapidly when he was but 60 or 70 feet behind it; that he put on his brakes gradually; that he came up to within two or three feet of the Baker truck and by then had slowed to about 30; that at no time, prior to the accident, did he slow to below 30; that when he heard the noise of the collision he proceeded about 100 feet and stopped; that he did not know whether or not he gave a signal that he was slowing down; that just prior to the accident he did not know how close Phillips was following him.

Phillips testified that between two to three short blocks from the scene of the accident, and while he was about 150 feet from Seaton's truck, he pulled out to the left to see if he could pass Seaton; that because of approaching cars he pulled back into line; that he took his foot off the gas and closed to within 50 feet of Seaton's truck; that he was then going between 40 or 50 miles per hour; that he followed the Seaton truck for about a block and then observed smoke coming from Seaton's tires; that he then applied his brakes hard; that Seaton's truck almost stopped; that as he approached Seaton's truck his brake pedal was down to the floor; that it takes a second or so for air brakes to take hold; that he saw he was going to hit Seaton's truck; that he pulled over to the left to avoid hitting Seaton; that he was then going about 25 or 30 miles per hour; that he missed Seaton's truck by only two feet; that he swung over towards the shoulder on the west side of the highway in the hope that the oncoming vehicle would pass between Seaton's truck and his own; that he collided with plaintiffs' automobile on the west shoulder of the highway; that Seaton gave no signal, by hand or otherwise, that he was about to slow down; that the first he knew Seaton was slowing down was when he observed smoke from the tires on Seaton's truck; that his truck was in overdrive at the time of the accident; that his top speed in overdrive would be between 48 to 52 miles per hour. Why Phillips did not try to pass Seaton on the right does not appear.

Members of the highway patrol who arrived at the scene shortly after the accident testified that they measured the skid marks leading to Phillips' truck; that they were 56 feet long from their start to the center of the highway and 46 feet long from there to the point of impact, and from there 153 feet to the front of the stopped truck; that the skid marks from Seaton's truck were 100 feet long.

[1-3] Each defendant trucking company contends that the evidence shows that its driver was not negligent and that the negligence of the other driver was the proximate cause of the accident. While the trial court might have found that the negligence of either Seaton or Phillips was the sole proximate cause, the evidence does not compel that conclusion. The evidence more reasonably sustains the findings not only that both were negligent, but that such negligence was concurrent and that both proximately caused the accident. The difficulty with the arguments advanced by each set of defendants is that they disregard the reasonable inferences from the evidence adverse to them. The rule is too well settled to require citation of authority that the power of an appellate court begins and ends with a determination as to whether the findings are supported by substantial evidence, contradicted or uncontradicted, or by reasonable inferences from that evidence. It is equally well settled that the question of proximate cause is normally one of fact. It is quite clear, from the above summary of the evidence, that the trial court was amply justified in inferring that the collision was proximately caused by the fact that Seaton and Phillips, at the speeds at which they were traveling, were both driving too close to the trucks ahead of them. As a result, when the Baker truck slowed down neither Seaton nor Phillips had sufficient room to slow down gradually.

Defendants Savage Transportation Co. and Phillips contend that the sole proximate cause of the accident was Seaton's failure to give a signal of his intention to slow down, which these appellants contend violated § 544(c) of the Vehicle Code requiring all operators of vehicles who suddenly slow down to give the appropriate signal "When there is opportunity to give such signal." The inferences to be indulged in on this issue were for the trial court. It is a reasonable inference that Seaton did not have time to signal, and that even if he did, Phillips was coming so fast and was so close that the accident would have occurred even if the signal had been given. Moreover, while the trial judge might have determined that the failure to give the signal was negligence on the part of Seaton, he also was entitled to infer that Phillips was negligent in traveling so fast and so close to Seaton, and that both acts of negligence concurred in causing the accident. It is obvious that whether or not the violation of § 544(c), assuming there was a violation, was the sole proximate cause of the accident was a question of fact for the trial court. Hardin v. Sutherland, 106 Cal.App. 473, 289 P. 900.

This same set of defendants argue that Phillips was not negligent. To arrive at this conclusion these defendants assume that Phillips was proceeding in a reasonable manner just prior to the accident. Based on this erroneous premise, they then argue that Phillips was faced with a sudden peril and that his course of conduct was reasonable and prudent under the circumstances. The evidence already reviewed, and the comments already made, sufficiently indicate the unsoundness of this argument.

[4] Defendants Coast Line Truck Service, Inc. and Seaton argue that not only was Seaton not negligent, but even if he were, the negligence of Phillips—his excessive speed under the circumstances, his lack of proper control, and his failure to drive onto the right shoulder when he knew traffic was approaching—constituted an intervening cause that broke the chain of causation.

So far as the negligence of Seaton is concerned, little need be said. Not only did he fail to give a signal, but the trial court was justified in finding that he was guilty of other acts of negligence. He followed the Baker truck at 60 to 70 feet on a busy highway at a speed of 40 miles per hour. In so doing, the trial court was justified in finding that he, as well as Phillips, violated § 531 of the Vehicle Code. Subdivision (a) of that section provides that: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." It is true that subdivision (b) provides in part that: "The provisions of this subdivision shall not prevent overtaking and passing," but, under the facts set forth, it is obvious that the trial court could reasonably infer that both Seaton and Phillips were not only traveling too fast, considering the conditions then existing, but also that both had ample and reasonable opportunity to slow down and space their trucks in a safe fashion after learning they could not pass. As to Seaton, there is testimony that after he discovered that he could not pass he fell behind the Baker truck about 100 feet and remained there for two blocks. He obviously had sufficient time to slow down gradually and still keep a safe distance from the vehicle ahead. Instead, he kept going at 40 miles per hour and closed to within 60 to 70 feet of the rear of the Baker truck. These facts support the finding that he was negligent regardless of whether he could or should have signalled his intention to stop.

The negligence of Phillips in violating the above section is obvious. He swung out to see if he could pass while about 150 feet from Seaton's truck, at which time he was about 2 or 3 blocks from the accident. There is evidence that he was then going 45 or more miles an hour and closed to within 50 feet of Seaton's truck, at which distance he followed Seaton for about a block before he observed smoke from Seaton's tires. The facts speak for themselves.

[5] There is no merit in the contention that the negligence of Phillips was an intervening act that, as a matter of law, broke the chain of causation. Seaton's negligence as found continued right up to the moment of the collision. An independent act of negligence that will break the chain of causation must be so disconnected in time and nature to make it plain that the damage was in no way a natural or probable consequence of the original wrong or omission. (See many cases collected 19 Cal.Jur. p. 570, § 19 and supplements.) Where the question is reasonably debatable the issue is not one of law but of fact for the trier of the fact.

[6] The facts of this case present a classic example of concurrent negligence. The proper rule applicable is stated in Herron v. Smith Bros., Inc., 116 Cal.App. 518, 521, 2 P.2d 1012, in quoting from the case of Sawdey v. R. W. Rasmussen Co. et al., 107 Cal.App. 467, 290 P. 684, [116 Cal.App. 518, 2 P.2d 1013] as follows: "'The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield

from liability him who sets in motion the other; for it is well settled that the negligence complained of need not be the sole cause of the injury. It is enough to show that it is a proximate concurring cause; that is, one that was so efficient in causation that, but for it, the injury would not have occurred.' "

The judgments appealed from are affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.

77 Cal.App.2d 223

LONERGAN v. MONROE et al.

Civ. 15312.

District Court of Appeal, Second District, Division 2, California.
Dec. 12, 1946.
Hearing Denied Feb. 6, 1947.

1. Evidence 🔑113(8)

In a conversion action, evidence as to contract price of converted property is admissible, not as showing the value conclusively, but only as a circumstance to aid in arriving at its value at time in question, since the value at the time and place of the conversion is the measure of damages. Civil Code, § 3336.

2. Trover and conversion 🔑47

In action for alleged conversion of neon signs fabricated for a particular purpose, and transformers, evidence of contract price of neon signs, though admissible to aid in arriving at value of signs at time of alleged conversion, did not determine amount of damages to be awarded. Civil Code, § 3336.

3. Trover and conversion 🔑61

In action to recover $3600 for conversion of neon signs and transformers, evidence sustained judgment for only $289 where evidence showed that signs were of no value except for purpose for which they were constructed and were useless except in advertising a place of business having the same name as that indicated by the signs and such place of business was no longer operated.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Joseph A. Lonergan against Forrest W. Monroe, A. L. Kroesen, and others, to recover damages for the alleged conversion of neon signs and transformers. From a judgment for plaintiff in an allegedly insufficient amount, the plaintiff appeals.

Judgment affirmed.

Joseph A. Lonergan in pro. per.

Zagon, Aaron & Sandler, of Los Angeles, for respondents.

WILSON, Justice.

This action was brought to recover damages in the sum of $3,600 for the alleged conversion of neon signs and transformers. The court awarded plaintiff the sum of $289 and he has appealed from the judgment contending that he is entitled to the amount demanded in his complaint.

In June, 1940, pursuant to a written conditional sales contract, appellant constructed several neon signs for one Dorothee Butte on premises which she was occupying under a lease. The contract provided that title to the signs should remain in appellant until all installment payments had been made. Within a year after the execution of the contract Mrs. Butte abandoned the premises leaving the signs in place, and failed to pay the installments required by her contract. Title to the real property was transferred to respondent Monroe in December, 1942. Early in 1943, upon being notified by the police that some person had broken into the building, he visited the premises and in addition to broken glassware and dishes he observed some broken tubing used in neon signs. In June, 1944, he made a written lease of the premises to respondent Kroesen and another by the terms of which all equipment attached to the building on the demised premises remained the property of respondent Monroe, the lessor. The property remained vacant during substantially the entire period of three years from the date of its abandonment by Mrs. Butte until the execution of the lease from Monroe to Kroesen.

When the last mentioned lease was executed the lessor granted permission to the lessees to make such use of the neon signs and the equipment connected therewith as they should desire. One of the signs, referred to as the large sign, was suspended between two iron posts imbedded in concrete, and the small sign was over the doorway of the premises, both reading "The Little Dutch Garden." The lessees did not intend to and did not adopt that name for the restaurant they were preparing to operate in the building. Pursuant to the terms of the lease and the permission granted by the lessor the lessees, in redecorating and renovating the premises, removed the signs and replaced them with others designating the name which they had chosen for their restaurant. They sold nine electrical transformers that had been a part of the equipment placed on the property by appellant.

The court found that respondents had converted the two signs and the nine transformers, and fixed the value of the signs respectively at $190 and $45, and the value of the transformers at $54, total $289, for which amount judgment was rendered in favor of appellant. The only controversy in the case is concerning the value of the converted equipment.

[1, 2] Evidence of the contract price of the signs was introduced, but the cost of merchandise does not determine the amount of damages to be awarded in an action for its conversion. Such evidence is admissible not as showing the value conclusively but only as a circumstance to aid in arriving at the value at the time in question. Angell v. Hopkins, 79 Cal. 181, 183, 21 P. 729; Greenebaum v. Taylor, 102 Cal. 624, 627, 36 P. 957. The rule is that the value at the time and place of conversion is the measure of damages. Civ.Code, sec. 3336; Griffin v. Porter, 54 Cal.App.2d 254, 255, 128 P.2d 820; French v. Robbins, 172 Cal. 670, 678, 158 P. 188. The applicability of this rule is patent where, as here, the property was fabricated for a particular purpose. Yukon River Steamboat Co. v. Gratto, 136 Cal. 538, 541, 69 P. 252.

The court did not find that the transformers that had been sold by respondents were attached to the signs when respondents took possession of the premises. There is a finding that respondents sold nine transformers that previously had been an integral part of the equipment covered by the contract between appellant and Mrs. Butte, but the court did not find and there is no evidence that respondents had disconnected them from the signs. As far as can be ascertained from the findings the transformers were unattached to any sign when respondents went into possession. At that time the transformers were hanging on hooks with loose wires attached, and the electrical inspector would not permit the restaurant to be opened until they had been removed. It will be assumed, in the absence of a finding to that effect, that they were not an integral part of the equipment at the time of the sale. The decisions holding that conversion of a part of an article is the conversion of the whole are not in point.

The evidence shows that the neon signs that are the subject of this action were of no value except for the purpose for which they were constructed and were useless except in advertising a place of business having the same name as that indicated by them. Appellant testified on direct examination that the value of the large sign was from $1,800 to $2,000, and the small sign, $350 to $390. On cross-examination he stated that they were of little value except at this particular place—"there might be some reclaim value." He conceded that his estimate of their value was based on the assumption that the signs and their operating equipment were intact and that transformers and other appliances necessary to place them in use were attached or available. He admitted that without a complete complement his valuations would be incorrect.

[3] Witnesses testified that there were no transformers in connection with either one of the signs and that the neon tubing on both had been broken. Appellant ad-

mitted that if he had removed the signs at the time Mrs. Butte abandoned them it would have been necessary to dismantle and reconstruct them before they could be used or sold. Witnesses who had had long experience in the construction, operation and care of neon signs testified concerning the value of the signs and transformers at the time respondents took possession and their evidence sustains the findings and judgment of the court, with which we cannot interfere.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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77 Cal.App.2d 282

In re Guardianship of BLACKWELL.

BLACKWELL et al. v. BLACKWELL.

Civ. 15613.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1946.

1. Insane persons 🔑29

An order restoring an incompetent to capacity is not appealable. Probate Code, § 1630.

2. Courts 🔑202(5)

Jurisdiction of the District Court of Appeal in probate proceedings cannot be extended to orders or judgments not made appealable by the Probate Code. Probate Code, § 1630.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate and guardianship of Amalia M. Blackwell, sometimes known as Amalia M. Artel and Amalia Artell Blackwell, an incompetent person. On petition of the incompetent, against the Security First National Bank of Los Angeles, guardian of the estate, to be restored to capacity and mental competency, wherein John H. Blackwell, petitioner's husband, objected to the petition. From an order restoring petitioner to capacity and mental competency, objector appeals.

Appeal dismissed.

John J. McMahon, of Los Angeles, for objector-appellant.

Morris C. Schrager, of Los Angeles, for petitioner-respondent.

Martin Forrest, of Los Angeles, for guardian-respondent.

MOORE, Presiding Justice.

March 12, 1945, Amalia M. Blackwell was adjudged an incompetent. The Security First National Bank of Los Angeles was appointed guardian of her estate and Olga Hogane, a sister, was made guardian of her person. Pursuant to her own petition she was by order of the court entered on May 21, 1946, restored to capacity and mental competency. Her husband, John H. Blackwell, who objected to her petition, brings the matter here by appeal from the last mentioned order.

[1, 2] The only appeals authorized in guardianship proceedings are those "From an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section." (Probate Code, sec. 1630.) The order restoring an incompetent to capacity is not one of the appealable orders mentioned in the cited section. The jurisdiction of this court in probate proceedings cannot be extended to orders or judgments not made appealable by the Probate Code. Guardianship of Morro, 36 Cal.App.2d 623, 627, 98 P.2d 552; Guardianship of Reser, 57 Cal.App.2d 935, 936, 135 P.2d 709. Section 1233, Probate Code, is not applicable inasmuch as appeals in guardianship matters are governed by section 1630, supra.

It is ordered that this appeal be and it is hereby dismissed.

McCOMB, and WILSON, JJ., concur.

77 Cal.App.2d 287

PEOPLE v. HILL et al.

Cr. 4054.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1946.

1. Robbery ⚿24(1)

Evidence showing that defendant drove two men to cafe and waited in his automobile while they robbed the place was insufficient to support conviction of robbery, in absence of evidence showing that defendant knowingly assisted the robbers to accomplish their purpose or to escape detection after defendant had gained knowledge of the crime.

2. Criminal law ⚿308

A defendant enters courtroom clothed with presumption of innocence which shields him until his guilt is established beyond a reasonable doubt, and the presumption must be weighed along with the evidence in deriving a verdict.

3. Criminal law ⚿560

Complicity in the crime cannot be guessed, but must be based upon substantial evidence sufficient to convince an unbiased mind to a moral certainty.

4. Criminal law ⚿308

The genesis of the doctrine of presumption of innocence lay, not in a design to protect the guilty, but in a zeal to prevent conviction of the innocent

5. Criminal law ⚿308

Where facts of a case are doubtful, the presumption of innocence is sufficient to turn the scales in favor of an acquittal.

6. Criminal law ⚿59(3, 5)

To be an "abettor" one must have instigated or advised the commission of the crime or have been present for purpose of assisting in its consummation.

See Words and Phrases, Permanent Edition, for all other definitions of "Abettor".

7. Criminal law ⚿59(5)

In order to render one an "abettor", there must be proof that not only did he aid the actor but that at same time he shared criminal intent of him who actually committed the offense.

8. Criminal law ⚿59(3)

One who keeps watch during commission of the crime to facilitate escape of the criminal is guilty as a "principal", but evidence of his mere presence without showing his preconcert with the actors is insufficient as proof of guilt.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Beverly Charles Hill, Willis Bishop, and Colbert W. Ingram were convicted of robbery, and the defendant Colbert W. Ingram alone appeals.

Reversed with instructions to dismiss the information.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The question for decision is whether appellant's contention that the evidence is insufficient to support a conviction of robbery should be sustained. The case was submitted to the court without a jury on the transcript of the evidence received by the examining magistrate, supplemented by the testimony of appellant and by both of his codefendants who had pleaded guilty. A resume of all the proof is indispensable to a fair appraisal of the conclusion here derived, to wit, that the judgment should be reversed.

Bishop's Testimony.

Defendant Bishop, called by the prosecution, testified substantially:

"I was first introduced to appellant on the evening of the robbery by Beverly Hill at a drive-in on Central Avenue, Los Angeles; the latter asked appellant to drive us around town; when we entered appellant's automobile I occupied the rear seat. Hill had the gun; I saw him get it about 8 o'clock from one Cox; during our drive the gun was not displayed to Ingram, nor was it mentioned; Hill had shown it to me at the drive-in; he had it in his belt, but appellant was not present. Hill and I at that time discussed the robbery; during our drive nothing was said about getting some money by a robbery; there was no talk of a robbery in Ingram's presence; Hill gave me his gun before we entered the barroom; I pointed the gun at the bartender. Ingram remained in the car while Hill and I got out at the point where Hill told him to stop. We were in the barroom about five minutes. When we left there we returned to the car. Its motor was not running; the lights were not on; Ingram was asleep; Hill woke him up and said 'pull away now.' Appellant switched on the lights and just before we turned the corner on Maple, Hill told him to turn them off. There was no discussion of a robbery or a holdup before Hill and I entered the barroom. After reentering the car the gun was hidden behind the seat. Ingram did not know anything about it or the robbery. I admit I told the officer today that I handed the gun to Hill when I got in the car but I made a mistake. When the officers stopped us the gun was down under the back of the front seat where I hid it, in a space between the left front door and the front seat."

Testimony of Officer Hugh R. Hill.

Officer Hill testified that as the car conveying defendants came around the corner without any lights he pulled his own car "in ahead and into them" and ordered them to stop, whereupon Bishop and Hill alighted. After ordering appellant to pull closer to the curb he then "turned around and pulled in back of them." On asking appellant for his driver's license he "seen him sliding something down across his lap * * * and I just seen the butt of a gun." He identified People's Exhibit A as the same article. After handcuffing the prisoners he interrogated them concerning the revolver. He asked appellant "how come he was sliding it across his lap, trying to hide at the time I walked up to the car." Ingram denied all knowledge of the gun. Bishop told the witness that he had got the money he carried in a crap game and that he had never seen the gun. Defendant Hill stated that he did not know the gun was in the car and had not seen it. Ingram had only 40 cents on his person.

Testimony of Officer Lambert.

Officer Lambert was called to testify concerning his conversation with each of the defendants on the morning of their arrest. His testimony as to appellant's statement follows:

"He stated he had met Bishop and Hill at the drive-in at 42nd and Central about 10:30 on the night of the 28th; that Hill showed him an automatic stuck in the belt of his pants. At that time they were inside the drive-in. Then he took a boy home—or rather, he took a boy to work and came back. Then Hill asked him to ride him around a bit, and Hill put five gallons of gas in the car and Bishop put two gallons of gas in the car, and they drove around for quite a while down around Watts. And coming back Bishop said, 'Take Main Street.' So they drove down Main Street and passed where the holdup was. Bishop said to Hill as they passed this bar, 'Well, here we are.' They circled the block, went up over on Broadway, then went around a couple of blocks, made a left turn and came back. He said he drove over on a side street and Bishop told him to park, then Hill and Bishop got out and Hill said, 'Hold everything until we get back.' So he said he sat down and was almost asleep, and they came back and said, 'Take off.' So he started up and left, but he left in such a rush that he forgot to turn his headlights on. And he said the police stopped them about half a block and at that time Bishop was fooling around in the back seat with something; he didn't know what it was. That was about the substance of the conversation at that time."

Appellant's Testimony.

Having testified concerning the call of Bishop and Hill at the drive-in, of their request that he drive them around for a while to find some girls, of their visit to Watts and return to 31st and Main Streets, appellant testified under cross-examination substantially as follows:

"It was between 8 and 9 o'clock when I met up with Hill and Bishop at the drive-in. I had known Hill six or eight months. I had been with him in his car on a previous occasion looking for girls. The car I drove I got from a garage where my uncle works; I did not know the owner. Hill first mentioned taking a ride; he said, 'Come on boys. Let's go out in Watts to see if we can pick up some girls'; Bishop was then sitting in Hill's car which was out of fix. It was parked at the drive-in but not next to my car. I had never driven Hill around before. I did not see Hill's gun at the drive-in. I did tell Officer Lambert that I had seen the gun at the drive-in; but I was mistaken; they had me all upset. I lied to the Officer; they just had me so frightened. I did not see the gun at any time prior to our arrest.

"I drove around the block in which the bar was located and as we passed the bar Bishop said, 'There it is'; I did not know what he meant; I paid no attention; I did not ask his meaning. Right after that I parked the car around the corner from the bar about 50 feet. Hill told me to park. He said, 'Stop here and wait until I come back'; I did not ask where he was going; he did not tell me; I did not ask why he wanted me to stop, neither did he tell me; they left the car and I remained in it; I shut off the motor and turned off the lights and went to sleep. They were gone 15 or 20 minutes, maybe not that long. I do not know that they ran back to the car. When Hill woke me up they were at the car. When Hill wakened me he said, 'Come on boys. Let's go.' I did not see the gun until the officer found it in the car; I did not put the gun behind me on the front seat. I switched on my lights and Hill told me to turn them off. I did not ask why; I had done nothing to cause me to conceal my license number; I did turn them on after Hill and Bishop got back in the car. I told the Officer that I took off so fast that I forgot to turn them on or something of the kind."

Testimony of Beverly Hill.

Defendant Hill called by appellant testified:

"On the evening of November 28, 1945, my automobile was in disrepair. Willis Bishop and I met appellant at a drive-in on Central Avenue. We asked him to drive us to Watts to look for some girls. We made no mention of an intention to hold up any place. I had my gun in the waistband of my trousers but never once did I or Bishop in any conversation mention the weapon or refer to any robbery. On returning from our drive to Watts we directed appellant to stop about 50 feet from the cafe at 31st and Main Streets. Sometimes on special occasions I wear a gun when I go out; that evening was such an occasion. My car was out of fix and I intended to rob somebody else's car that night and take some parts. While at Watts Bishop and I walked away from Ingram while he sat in the car. We discussed the plan and made up our minds to commit a robbery after we could find no girls but told appellant nothing of the decision. When we stopped at 31st and Main Streets neither Bishop nor I told appellant of our purpose to rob; we left Ingram in the car while we visited the cafe where Bishop with my gun robbed the bartender. I left the barroom while Bishop was collecting the money; I preceded Bishop on the return to the automobile. I found the motor silent, the headlights dark and Ingram asleep. I sat beside appellant and told him Bishop and I had done something wrong and by rushing him made him nervous. After we had started the engine with some difficulty Bishop arrived and occupied the rear seat. Pursuant to my orders to 'pull away now' appellant switched on the lights and proceeded east on 31st Street; after a half block I told Ingram to turn off the lights. Near Maple Avenue we were stopped by the police, whereupon Bishop threw the gun on the front seat and he and I jumped out leaving Ingram alone. At no time did either Bishop or I tell Ingram we intended to rob or that we had a gun."

The Evidence Applied.

[1, 2] It is to be observed that there is not a word of testimony that appellant had previous knowledge of the felonious purpose entertained by his two guests. The only possible support for his conviction must therefore be found in reasonable inferences deducible from the testimony and the circumstances. The incriminating circumstance was appellant's driving the men to the cafe and waiting in his automobile while they visited the place.

By all the evidence favorable to the state's contention nothing was established but a suspicion of appellant's guilt. The testimony of the People's witnesses is devoid of act or word that may be interpreted as competent proof of a crime. If the trial court had believed the two convicts and appellant, the latter's conviction could not have resulted for they completely exculpated him. If it disbelieved them, as of course it was privileged to do, a conviction was out of the question, for the record discloses that the total of the state's evidence is wanting in the essentials of proof of an established crime. To suspect an accused is the privilege of prosecutor, judge or layman when he has been found in the company of criminals. But to put the brand of infamy upon a person because he has been brought to the bar can find no justification in law or morals. To do so is to disregard legal principles long cherished. Appellant entered the courtroom clothed with the presumption of innocence which shielded him until his guilt was established beyond a reasonable doubt. People v. Martinez, 57 Cal.App. 771, 774, 208 P. 170. This could have been done only by substantial proof that he knowingly assisted the robbers to accomplish their purpose or to escape detection after he had gained knowledge of the crime.

The attorney general has cited many authorities (People v. Simpson, 66 Cal.App.2d 319, 152 P.2d 339; People v. Soffer, 34 Cal.App.2d 301, 93 P.2d 183; People v. King, 7 Cal.App.2d 672, 46 P.2d 798; People v. Hopkins, 125 Cal.App. 457, 13 P.2d 975; People v. Moe, 116 Cal.App. 740, 3 P.2d 354, 4 P.2d 234; People v. Jaggers, 120 Cal.App. 733, 8 P.2d 206) in support of the judgment. None of them is apropos. In each instance the driver of the car conveying the criminals was proved to have participated in the fruits of the crime or to have wilfully aided the perpetrators in their attempt to escape detection. The argument quoted from People v. Moe, 116 Cal.App. 740, 751, 3 P.2d 354, 4 P.2d 234, was merely a defense of the jury's finding of the driver's guilt under the facts of that case and was not intended as a rule to govern courts and juries in every action against the chauffeur of a bandit.

[3-5] The presumption of innocence must be weighed along with the evidence in deriving a verdict. Dodson v. United States, 4 Cir., 23 F.2d 401, 402. Complicity in the crime cannot be guessed but must be based upon substantial evidence sufficient to convince an unbiased mind to a moral certainty. Dodson v. United States, supra. See People v. Newland, 15 Cal.2d 678, 104 P.2d 778. The genesis of the doctrine of presumption of innocence lay not in a design to protect the guilty but in a zeal to prevent conviction of the innocent. Nanfito v. State, 136 Neb. 658, 287 N.W. 58, 63. Where the facts of a case are doubtful the presumption is sufficient to turn the scales in favor of an acquittal. Burk v. State, 216 Ala. 665, 114 So. 72.

[6-8] In the light of the foregoing we turn to a consideration of whether appellant was a principal in the crime by virtue of abetting the actors. To be an abettor one must have instigated or advised the commission of the crime or have been present for the purpose of assisting in its consummation. State v. Hart, 186 N.C. 482, 120 S.E. 345. Although a man is present while a robbery is perpetrated, if he takes no part in it or does not act in concert with the criminals he is not a principal. Burrell v. State, 18 Tex. 732. He must render aid to the actor to render him an abettor. State v. Epps, 213 N.C. 709, 197 S.E. 580, 583. Also, there must be proof that not only did he aid the actor but that at the same time he shared the criminal intent of him who actually committed the offense. People v. Terman, 4

Cal.App.2d 345, 40 P.2d 915; People v. William Yee, 37 Cal.App. 579, 174 P. 343; People v. Armentrout, 118 Cal.App.Supp. 761, 1 P.2d 556. Even if there were a common unlawful purpose between the actual criminals and the person accused of abetting their deed, to make the latter guilty his acts must have been done in pursuance of the criminal scheme; and it must be established that not only was the accused present but that he actively aided and encouraged the felons, and that he did so with knowledge of the felonious intention. Combs v. Commonwealth, 224 Ky. 653, 6 S.W.2d 1082; Mowery v. State, 132 Tex.Cr.R. 408, 105 S.W.2d 239; Steen v. State, 125 Tex.Cr.R. 653, 69 S.W.2d 144. The mere presence of the accused at the scene of the crime does not essentially establish his guilt as an abettor. Of course it is elemental that one who keeps watch during the commission of the crime to facilitate the escape of the criminal is guilty as a principal. But evidence of his mere presence without showing his preconcert with the actors is insufficient as proof of guilt.

The judgment is reversed with instructions to dismiss the information.

McCOMB and WILSON, JJ., concur.

77 Cal.App.2d 236

BOSSERMAN v. OLMSTEAD.

Civ. 15608.

District Court of Appeal, Second District,

Division 2, California.

Dec. 12, 1946.

Hearing Denied Feb. 6, 1947.

1. Appeal and error 🔑930(1)

On appeal, conflicting evidence is to be viewed in the light most favorable to respondent.

2. Trial 🔑260(1)

Refusal to give requested instruction was proper where principles of law involved therein were covered in other instructions.

3. Trial 🔑260(1)

Where trial court has fully covered certain principles in instructions to jury, it is unnecessary for court to repeat substance of such instructions in other words.

4. Trial 🔑252(8)

Where record contained no evidence that plaintiff either knew or thought that he was in peril, or that he did anything assuming that he was in peril prior to the time he was struck by defendant's automobile, court properly refused to give a requested instruction on the doctrine of imminent peril.

5. Trial 🔑261

Requested instruction containing an inaccurate statement of the law was properly refused.

6. Negligence 🔑4

"Negligence" is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

7. Automobiles 🔑216

On the issue of contributory negligence of a pedestrian who was struck by an automobile, the question at issue is whether pedestrian was exercising ordinary care.

8. Negligence 🔑141(4)

Instruction that general human experience supports inference that, when one looks in direction of an object clearly visible, he sees it, and that, if evidence shows he looked and did not see, evidence is either conflicting or discloses negligent inattentiveness was not made erroneous by the inclusion of the statement that when one listens he hears that which is clearly audible.

9. Appeal and error 🔑1064(1)
Trial 🔑267(3)

The modification of opening phrase of instruction by insertion of the word "if" so as to read "You are instructed that 'if' it was the duty of defendant to anticipate that he might meet persons or vehicles at any point on the highway," although erroneous, was not prejudicial error in view of fact that substance of instruction followed thereafter and correctly stated the law as to what defendant must do in order to avoid a charge of negligence. Const. art. 6, § 4½.

10. Automobiles ⚷246(30)

In pedestrian's personal injury action against motorist, court properly instructed that where evidence is as consistent with neglect of duty or care on part of plaintiff as it is with neglect of duty or care on part of defendant, then plaintiff cannot recover for his damages.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by George W. Bosserman against Lester D. Olmstead to recover for injuries received when plaintiff was struck by defendant's automobile. Judgment for defendant and plaintiff appeals.

Affirmed.

David Sokol and John W. Rice, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries sustained by plaintiff, a pedestrian, when struck by defendant's automobile.

[1] The evidence being viewed in the light most favorable to the defendant (respondent) and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424 et seq., the essential facts are:

On April 1, 1945, about 8:00 p. m., plaintiff was walking southerly across Colorado Street in Pasadena and at the same time defendant's automobile was proceeding in a easterly direction on that street. Defendant's automobile struck plaintiff at a point outside of any crosswalk causing him serious injuries.

There are three questions necessary for us to determine which will be stated and answered hereunder consecutively.

First: *Did the trial court err in refusing to instruct the jury as follows?*

1) *"You are instructed that the defendant has pleaded as one of his defenses that the plaintiff was guilty of contributory negligence, that is to say that plaintiff was guilty of some negligence which proximately contributed to the accident and his injuries. The law does not place the burden of disproving this upon the plaintiff. In other words, the plaintiff does not have to prove that he was not guilty of contributory negligence. But the law does place the burden upon the defendant to prove that the plaintiff was guilty of negligence and that such negligence proximately contributed to the accident and his injuries. Defendant must prove this by a preponderance of the evidence, that is, evidence that over-weighs or over-balances the evidence against it. Therefore, if the preponderance of the evidence is that the plaintiff was not guilty of any negligence, or that even if guilty of some negligence that such negligence, if any, did not contribute to the accident or his injuries, then your finding on the issue of contributory negligence must be in favor of the plaintiff, that is to say, that the plaintiff was not guilty of contributory negligence."*

[2, 3] The refusal to give the foregoing instruction was not error for the reason that the principles of law involved therein were given to the jury in other instructions set forth at pages 40 and 29, Volume II, Reporter's Transcript. In the first of these instructions the trial judge informed the jury that defendant alleged contributory negligence, and that this allegation made it an issue in the case and required the court to give instructions thereon. In the second of the instructions the judge told the jury that the party who asserts the affirmative of an issue carries the burden of proving it; that if no evidence was given by either side on such issue, their finding as to it would have to be against that party and also instructed them upon

the preponderance of evidence rule. Thus it appears that these two instructions told the jury that it was defendant who had pleaded contributory negligence and that the burden was on him to prove the same by a preponderance of the evidence, and that if the evidence was evenly balanced in the matter, the finding would have to be against the defendant. The subject matter of the above instruction was therefore fully covered by instructions given by the trial court, and it was unnecessary for the judge to repeat the substance of such instructions in other words.

2) *"A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. (If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer.)"*

[4] The refusal to give this instruction was correct for the reason that there is nowhere in the record any evidence that plaintiff either knew or thought that he was in peril, nor is there any testimony that he did anything assuming that he was in peril. It is argued by plaintiff that *defendant* testified that he saw a westbound car swerve to the north, and then the speculation is indulged that maybe the plaintiff took some sudden action to avoid being struck thereby which brought him into the path of defendant's car. The fallacy in this argument is that there is no evidence whatsoever upon which it can be based. There is no evidence that the *plaintiff* saw or heard that car or that plaintiff took any sudden action of any kind, or that he knew, or thought that he was in any peril, or that he moved forward, or moved at all because of such swerving car. There is no evidence that plaintiff at any time felt that he was in danger or did anything by reason of any such alleged danger.

Off v. Crump, 40 Cal.App. 173, 180 P. 360, cited by plaintiff is not in point since such case does not deal with the doctrine of imminent peril.

3) *"You are instructed that the fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every person who crosses a busy street takes chances and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business or even pleasures?*

"It cannot be said that a person is guilty of contributory negligence because he attempts to cross a street when an automobile is approaching. All that is required on a given occasion of a pedestrain in attempting to cross a street is to exercise ordinary care [*sic*] *of his sense of sight and hearing to observe on-coming cars. It is not negligence to attempt to cross in front of an approaching vehicle if it is at such a distance away that an ordinarily prudent person would believe he could make such crossing in safety, although it may afterward appear by evidence that a different course of conduct would have been safer on his part."*

[5-7] The trial court properly refused the foregoing instruction for the reason it contained an inaccurate statement of the law. The third sentence of the instruction reading, "The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business or even pleasures?" was clearly an erroneous statement of the law. The court correctly defined negligence as the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. The sentence which we have quoted from the instruction departs from this rule of law and tells the

jury that the real question is not whether a pedestrian was at all times exercising ordinary care but whether what he did was reasonably necessary to meet the ordinary requirements of business or even pleasure. This is far different from telling the jury that the question at issue was whether the plaintiff was at all times exercising ordinary care. From the sentence in question, the jury could well conclude that if the plaintiff thought it was reasonably necessary for him to go across the street at the time he did in order that he might reach the restaurant at which he expected to obtain a meal, then it was all right for him to cross the street no matter what the circumstances and no matter what chances he took and no matter whether he was exercising ordinary care or not. This sentence was plainly misleading and was an incorrect statement of the law.

4) "*You are instructed that general human experience supports the inference that when one looks in the direction of an object clearly visible, he or she sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.*"

[8] There was no error in the refusal to give such instruction since the court gave substantially the same instruction at the request of defendant. The only difference between the instructions requested by plaintiff and defendant is that in the instruction requested by plaintiff the reference to hearing was eliminated. It was not erroneous to include in such statement that when one "listens, he hears that which is clearly audible." Such instruction was a correct statement of the law and applicable to the facts in the instant case for the reason that it is common knowledge that automobiles make some noise when traveling through a throughfare.

5) "*You are hereby instructed that a pedestrian lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic rules and regulations.*

"*If plaintiff, George W. Bosserman, was crossing the street in a marked or an unmarked crosswalk, and was exercising ordinary care, then he had the right to assume that defendant, Olmstead, would obey the traffic laws and would yield the right of way to him. He also had the right to assume that defendant, Olmstead, would keep a vigilant lookout for him and discover his presence in the crosswalk in sufficient time to yield the right of way, for it was the said defendant's legal duty to know whether pedestrians were using the crosswalk.*"

Failure to give this instruction was correct. All the matter contained therein were covered by other instructions of the court to the jury with the exception of the rule stated in the last sentence of the instruction. This sentence does not contain an accurate statement of the law for the reason that it is only when the plaintiff is himself exercising ordinary care that he has a right to assume or expect that others will also obey the law and exercise ordinary care. Since the last sentence does not contain this qualification, the instruction was incorrect.

6) "*A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus, it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. (One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.)*"

The refusal to give this instruction was not error for the reason that the substance of the requested instruction was given through other instructions.

Second: *Did the trial court err in giving the following instruction after modifying the instruction by inserting the word "if" in the first sentence thereof?*

"You are instructed that if it was the duty of the defendant, Olmstead, to anticipate that he might meet persons or vehicles at any point on the highway, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and use due care to keep his machine under such control as would enable him to avoid a collision with another person or vehicle using due care and caution, and if the situation requires it, he must slow up and stop. If you find that the defendant, Olmstead, failed to use that care and that such failure was the sole proximate cause of the injuries sustained by plaintiff, George W. Bosserman, then you must find damages in favor of the plaintiff and against the defendant, Olmstead."

[9] The modification of the instruction, though erroneous, did not constitute *prejudicial* error. The substance of the instruction is contained in that portion of it beginning with the words "and he must, in order to avoid a charge of negligence, keep a proper lookout," etc. By this main portion of the instruction the jury was told that the defendant must, in order to avoid a charge of negligence, keep a proper lookout for persons or vehicles at any point in the highway so as to avoid a collision, and if the situation required it, he must slow down and stop. They were further told that if the defendant Olmstead failed to use that care, and any such failure was the sole, proximate cause of the injuries, then they must find damages in favor of the plaintiff. This was the substance of the instruction.

Clearly, the jury was not misled by the improper modification of the instruction and under Article VI, section 4½ of the Constitution since such error was not prejudicial to plaintiff it must be disregarded by this court.

Third: *Did the trial court commit prejudicial error in giving the following instruction?*

"You are instructed that where the evidence is as consistent with neglect of duty or care on the part of the plaintiff as it is with the neglect of duty or care on the part of the defendant, then plaintiff cannot recover for his damages."

[10] The foregoing instruction was correct. (Sheldon v. James, 175 Cal. 474, 480, 166 P. 8, 2 A.L.R. 1493; Morris v. Morris, 84 Cal.App. 599, 602, 258 P. 616; Straten v. Spencer, 52 Cal.App. 98, 108, 110, 197 P. 540.)

Since no error appears in the record, the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

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77 Cal.App.2d 233

In re KIMMIS' ESTATE.

SHAFFER v. KALAMAZOO COLLEGE.

Civ. 15519.

District Court of Appeal, Second District,
Division 2, California.
Dec. 12, 1946.

1. Evidence 🔑**65**

Testator who was an attorney, was presumed to know the meaning of the phrase "residuary estate". Probate Code, §§ 106, 161(4).

2. Wills 🔑**822**

Where testator, after bequeathing all his household furniture and furnishings, bequeathed to a college not to exceed one-half of his residuary estate, then made certain cash bequests to named pecuniary legatees, and then disposed of the remainder, probate court was bound to resort to the residuary estate for payment of general bequest and college was not entitled to one-half of the estate after distribution of furniture and furnishings. Probate Code, §§ 106, 161(4), 751.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Proceedings in the matter of the estate of Austin N. Kimmis, deceased, wherein Walter W. Shaffer filed a petition which was contested by Kalamazoo College. From a portion of an order distributing the estate of the deceased, Kalamazoo College appeals.

Affirmed.

W. Ward Johnson and Frederic A. Shaffer, both of Long Beach, and Haight, Trippet & Syvertson, of Los Angeles, for respondent.

Clock, Waestman & Clock, of Los Angeles, for appellant.

McCOMB, Justice.

This is an appeal from a portion of an order distributing the estate of decedent, Austin N. Kimmis.

The essential facts are these:

Mr. Kimmis, an attorney at law, died on January 5, 1945. He left surviving him only collateral heirs, his wife having predeceased him. Decedent left a will dated June 27, 1939. After directing payment of his debts and funeral expenses and bequeathing all his household furniture and furnishings to Marie Rearson Matziner, the will provided as follows:

"It is my will that all or such portion of my residuary estate as is legally permissible, but not exceeding one-half thereof, be distributed to Kalamazoo College, Kalamazoo, Michigan, which bequest, under such rules as may be prescribed by the governing body of that institution, shall constitute a loan fund from which loans may be made to young men and women desiring to attend college. Before making any loan the governing body should, after careful investigation, be convinced that the applicant is of good moral character has mental capacity of a high order and is inspired by motives that will insure earnest effort.

"Fourth. I further hereby give, will, devise and bequeath from such portion of my estate as shall remain the following: * * * (Then followed a list of collateral relatives and strangers who were given cash bequests in different amounts.)

"All the rest, residue and remainder of my estate I hereby will, devise and bequeath as follows:

"Twenty-two (22%) per cent thereof to each of the following: Frances Mode Goodall, Douglas G. Mode and Robert S. Mode, children of my wife's deceased brother, all now residing at Midland, Michigan, and Jennie D. Mosher, now residing at 72 Tuxedo Avenue, Detroit, Michigan; and

"Twelve (12%) per cent thereof to Laura Mosher Korneffel, now residing at Detroit, Michigan."

These persons just named in the latter portion of paragraph Fourth of the will are the individuals directly benefited by the lower court's interpretation of the will as expressed in the decree of distribution. The probate court ordered the specific bequests paid before payment and distribution to appellant of one half of the residue of the estate.

Appellant urges that *the probate court erred in distributing to named pecuniary legatees the cash bequests before computing appellant's share under the will.*

This proposition is untenable. It is argued that the court, after distributing the household furnishings, should then have given one half of the estate to appellant and resorted to the remaining one half exclusively for the payment of cash bequests. This contention is without merit. Decedent by the third paragraph of his will bequeathed to appellant not to exceed one half of his *residuary estate.*

[1] A residuary estate is defined by section 161(4) of the Probate Code as that portion which remains after all the bequests of a will are discharged. Testator was a lawyer and therefore it is presumed knew the meaning of the phrase *residuary estate.** It is further provided by section 106 of the Probate Code that technical words are to be considered as having been used in their technical sense unless the context clearly indicates a contrary intention. The cash bequests in the will are general legacies and in their payment the probate court was required to resort, under section 751

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* See Estate of Bourn, 25 Cal.App.2d 590, 595, 78 P.2d 193.

of the Probate Code, to the property of the estate in the following order:

1) Property which was expressly appropriated by the will therefor.

2) Property not disposed of by the will.

3) Property which was devised or bequeathed to a residuary legatee.

[2] Since in the present case there is not any property "expressly appropriated by the will" for the payment of general bequests and there was not any "property not disposed of by the will" it follows that the probate court was bound to resort to the residuary estate for the payment of the general bequests.

The decree is affirmed.

MOORE, P. J., and WILSON, J., concur.

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77 Cal.App.2d 227

BALFOUR v. HEUER.

Civ. 15335.

District Court of Appeal, Second District,
Division 2, California.
Dec. 12, 1946.

1. Appeal and error 🔑931(1)

On appeal from judgment for plaintiff, appellate court must view evidence in the light most favorable to plaintiff.

2. Sales 🔑181(11), 359(1)

In action for price of merchandise sold and delivered, trial court's finding that defendant was indebted to plaintiff in the amount sued for and that there was no mistake of fact as to quantity of merchandise delivered, as contended by defendant, was sustained by substantial evidence.

3. War 🔑4

In action for price of merchandise sold and delivered, buyer had the burden of proving affirmative defense that a ceiling price for the merchandise had not been established by appropriate agency of federal government. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

4. War 🔑4

Buyer could not defeat recovery of price for merchandise sold and delivered on ground that seller had not had a ceiling price established for the merchandise in absence of evidence that such ceiling price had not been fixed before seller purchased the merchandise from a company which had purchased it as war surplus goods from United States government. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Vernon Balfour against Sam Heuer, doing business as Bay Cities Paint and Wallpaper Company, to recover amount due for merchandise sold and delivered. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Hyman Schwartz, of Los Angeles, for appellant.

James J. McCarthy, of Los Angeles, for respondent.

WILSON, Justice.

The complaint in this action is on a common count alleging that appellant became indebted to respondent in the sum of $2,150 for goods, wares and merchandise sold and delivered to respondent. Appellant answered alleging that he agreed to purchase 86,000 square yards of sublimated gauze for said sum but that respondent delivered only 43,000 square yards; that immediately after ascertaining the amount of gauze actually delivered appellant notified respondent of the mistake, demanded an additional 43,000 square yards, and offered to return the merchandise already delivered if respondent could not furnish such additional amount. Upon delivery of the gauze appellant signed an I.O.U. for the sum of $2,150. Findings and judgment were in favor of respondent and appellant has appealed.

Appellant contends that the I.O.U. was received by respondent in payment for the gauze and therefore he cannot recover for goods, wares and merchandise sold, but if entitled to recover at all his complaint should have been on the written instrument. He also contends that by reason of the mistake of fact, to wit, the delivery of a less amount of gauze than that purchased, as alleged in his answer, respondent may not recover any sum whatsoever.

[1, 2] The evidence given by the parties is in direct conflict in several particulars. The trial court has resolved the conflict by its findings and judgment, and we must view the evidence in the light most favorable to respondent. The latter denied any misrepresentation and testified that the I.O.U. was not taken in payment for the merchandise but that at the time of delivery he took it in order to protect his storage, fire and theft insurance by showing that the goods had been delivered from the storage house to appellant's place of business. According to respondent's evidence when he requested payment for the gauze appellant said that he had made a mistake and had paid too much for the material—no objection was then raised concerning the amount he had agreed to pay. The trial court accepted respondent's evidence of the transaction as true and found that appellant was indebted to respondent in the sum sued for and that there was no mistake of fact as alleged in appellant's answer. Since the finding is based on substantial evidence we do not question its correctness.

[3,4] Appellant pleaded as a special defense that the sale was void by reason of the fact that respondent had not had the price of the gauze established pursuant to the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq. It is admitted that respondent had not procured the establishment of a price. He had purchased the gauze from a company which had bought it as war surplus goods from the United States government, and the government in turn had purchased it from the manufacturer. Whether or not the price had been fixed prior to respondent's purchase of the merchandise does not appear from the evidence. Appellant's contention in this behalf rests on his affirmative defense and the burden was upon him to show that a ceiling price had not been established by the appropriate agency of the United States government. He offered no evidence in support of his defense and the point is not available to him on his appeal.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

77 Cal.App.2d 217

WESTERN GULF OIL CO. v. TITLE INS. & TRUST CO.

Civ. 3547.

District Court of Appeal, Fourth District, California.

Dec. 11, 1946.

1. Appeal and error 🔑**80(1)**

Under statute providing that in an action for declaratory relief the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed and that such declaration shall have the force of a final judgment, where other relief is not sought or after passing upon the issue of "further relief", the court may make such a binding declaration which would have the effect of a final judgment and be appealable. Code Civ.Proc. §§ 963, 1060.

2. Appeal and error 🔑**80(6)**

In an action for declaratory relief in which other relief is also sought, the determination of a preliminary question of liability does not constitute an appealable "final judgment" where a contrary intent appears. Code.Civ.Proc. §§ 963, 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

3. Appeal and error 🔑**80(6)**

In action to determine whether defendant was chargeable under a lease with a proportionate royalty share of cost of dehydrating the wet oil, and to recover amount claimed due in that connection, order entered in minutes adjudging plaintiff entitled to charge defendant the proportionate cost of dehydration was not appealable "final judgment", where the hearing was had on that issue alone with a further hearing on the other issue to be had, in event liability was found to exist. Code.Civ.Proc. §§ 963, 1060.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Western Gulf Oil Company against Title Insurance & Trust Company to determine whether defendant, as lessor of certain oil lands, was chargeable under terms of the lease with its proportionate royalty share of the cost of dehydrating the wet oil, and to recover the amount claimed to be due in that connection. An order was entered in the minutes adjudging plaintiff to be entitled to charge the defendant the proportionate part of the cost of dehydrating the oil produce on the premises involved. On motion to dismiss defendant's appeal from the order.

Motion granted and appeal dismissed.

Robert Wanamaker, of Pasadena, and Boyle, Holmes, Fry & Garrett, of Los Angeles, for appellant.

J. G. Leovy and P. O. Broxon, both of Los Angeles, and Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal on the ground that the order from which it was taken did not constitute a final judgment and was not appealable.

The action is one for declaratory relief and for services rendered. It was brought for the purpose of determining whether the defendant, as the lessor of certain oil land, was chargeable under the terms of the lease with its proportionate royalty share of the cost of dehydrating the wet oil, and to recover the amount claimed to be due in that connection.

The defendant made a motion in the trial court asking that an order be made providing that the trial of the case should proceed "in the following manner, to wit: that it shall first be determined whether or not the defendant is liable under its contract for the payment of any dehydration costs, and in the event it is determined that liability exists that the matter be set down for further hearing at a time which will give the parties reasonable opportunity to prepare for the remaining issues." This motion was made on February 18, 1946, at which time the parties filed a written stipulation agreeing that the motion should be granted. On the same day, a minute order was entered granting this motion in accordance with this stipulation.

On August 26, 1946, after a hearing on the issue of liability, the following order was entered in the minutes:

"The above entitled cause having been heretofore heard and submitted to the Court for consideration and decision and the Court after due consideration and being fully advised in both the law and the premises, it is hereby Ordered, adjudged and decreed that plaintiff be and is hereby declared to be entitled to charge defendant the proportionate part of the cost of dehydrating the oil produce on the premises involved herein."

From the clerk's certificate it appears "that a written judgment, in accordance with said order, has not been filed in this action, and that notice of entry of judgment is not on file in said action." Notice of appeal from this minute order was filed by the defendant on October 15, 1946. The plaintiff has now moved to dismiss this appeal on the ground above stated.

While it seems probable that this appeal was taken largely as a precautionary measure, the appellant earnestly contends that this order constitutes a final judgment from which an appeal lies, because section 1060 of the Code of Civil Procedure provides that in an action for declaratory relief "the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed," and that "such declaration shall have the force of a final judgment." It is argued that this "declaration" of rights and duties is thus made separable from any "other relief" sought, and given "the force of a final judgment"; and that it follows that the order in question is a final judgment within the meaning of section 963, Code of Civ. Proc. In effect, it is contended that a statutory exception is thus provided, in declaratory relief actions, to the usual rule that an order or judgment is not appealable, although it may fix certain liabilities and rights of the parties, where further judicial action is essential in order to determine the issues raised in the action.

[1] It seems clear, under that statute, that where "other relief" is not sought, the court has the power to make such a "binding declaration" which would have the effect of a final judgment, and be appealable. And the court would have the same power after passing upon "further relief" which was also sought. Whether a court has the same power, without passing upon an issue of "further relief" which is also raised, is not so clear. Any such power, if it exists, must be based upon inference and not upon the express language of the statute.

[2] Assuming, for present purposes, that such a power is conferred by this statute, it is not one which must be exercised in all such cases. Whatever the power given, it is one which "may" be exercised by the court. And it does not follow that in any action for declaratory relief in which other relief is also sought, the determination of a preliminary question of liability must, of necessity, constitute a final judgment which is appealable. Such a result should not follow where a contrary intent appears. (Johnson v. Solomons, 124 Cal.App. 43, 12 P.2d 140) and where a further hearing has been ordered for the express purpose of determining the remaining issues raised in the action.

[3] Such a contrary intent here sufficiently appears from the record at the request of the parties, the court ordered that the action be tried in a certain manner; including both a hearing on the issue of liability and a further hearing on the other issue, in the event liability was found to exist. The order appealed from was entered in accordance with, and as a part of, this prearranged manner of trial of the action in its entirety. In effect, it was stipulated that a decision on the issue of liability, if in favor of this respondent, should be preliminary in nature and should be followed by a further hearing to determine its ultimate effect. The court's order in this connection approved and confirmed this method of trial, and clearly disclosed the court's intention in that regard.

It sufficiently appears that the order appealed from was interlocutory in nature, was entered as a part of a prearranged method of trial, and was not intended to be a final judgment. It follows that it was not an appealable order or judgment, regardless of what might have been its effect under different circumstances.

The motion is granted and the appeal is dismissed.

MARKS and GRIFFIN, JJ., concur.

77 Cal.App.2d 189

WESTWOOD et ux. v. FRANKLIN.

Civ. 15488.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1946.

Vendor and purchaser 🔑44

In action to quiet title and for declaratory relief, evidence sustained findings that an offer to sell to defendant, who was in possession of land as tenant, was revoked by operation of law prior to a purported acceptance of offer by defendant by lapse of an unreasonable length of time between making of offer to sell and acceptance, so that there was never any valid contract between the parties.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Samuel T. Westwood and Nella Westwood, husband and wife, against Samuel B. Franklin to quiet title and for declaratory relief. From an adverse judgment, defendant appeals.

Judgment affirmed.

Gordon W. Levoy, of Hollywood, and A. Albert Spar, of Los Angeles, for appellant.

Miller & Beck, of San Fernando, for respondents.

DORAN, Justice.

In this action to quiet title and for declaratory relief plaintiff prevailed and defendant appeals.

The facts briefly are as follows: In October, 1944, plaintiff purchased a residence occupied by defendant as a tenant. Following the purchase, plaintiffs' efforts to get possession were in vain; it appears from the record that an institution referred to as the O. P. A. complicated this procedure. Finally, plaintiff offered to sell the property to defendant; this was two or three months after the purchase and the offer was by letter written to defendant. Hearing nothing from defendant, plaintiff sold the property to one William A. Roach; an escrow was opened in the bank to complete the transaction. On August 24, 1945, upon learning of the sale, defendant wrote a letter to plaintiff accepting the offer made months before and notified the escrow holder of a claim of interest in the property. Defendant was still in possession.

At the trial the court found against defendant on all issues. In particular, the court found that the "offer was revoked by operation of law prior to its acceptance by the lapse of said unreasonable length of time between the making of said offer and its purported acceptance by defendant." Also, "that there was never any valid binding contract between plaintiffs and defendants."

On appeal, appellant argues that an unreasonable length of time had not elapsed; that the offer was still open; that certain evidence was received with regard to proceedings had before said O. P. A. and a few other objections on appeal that do not merit attention.

The appeal is without merit, in fact frivolous. No citation of authority nor further consideration is necessary to justify the action of the trial court. The evidence is sufficient to sustain the findings and there are no errors in the record.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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77 Cal.App.2d 389

PEOPLE v. DODSON et al.

Cr. 1976.

District Court of Appeal, Third District,
California.

Dec. 21, 1946.

Hearing Denied Jan. 20, 1947.

1. Criminal law 🔑1144(13)

Reviewing court in criminal case must indulge all presumptions in support of the judgment, and must consider evidence, so far as there is any conflict therein, in the light most favorable to the prosecution.

2. Robbery 🔑24(3)

In robbery prosecution, guilty participation may be shown by circumstantial as well as by direct evidence.

3. Criminal law 🔑1159(6)

If circumstances shown by evidence justify conclusion of jury in criminal case, reviewing court has no authority to interfere therewith.

4. Robbery 🔑24(1)

Under rule that all elements of corpus delicti may be proven by presumptive or circumstantial evidence, commission of robbery is sufficiently established by proof that victim had valuables on his person at time of being assaulted, beaten and rendered unconscious, and that they were missing when he regained consciousness.

5. Criminal law 🔑1160

It is function of jury in first instance and of trial court after verdict to determine what facts are established by the evidence, and verdict approved by court, cannot be set aside on appeal for insufficiency of evidence to support it, unless there is clearly no substantial evidence supporting court's conclusion on any hypothesis.

6. Robbery ⚿24(1)

Evidence warranted conviction of robbery.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Oscar Dodson and Ross Terry were convicted of robbery, and they appeal.

Affirmed.

C. K. Curtright and Geo. I. Lewis, both of Sacramento, for Ross Terry.

Wallace Shepard, of Sacramento, for Oscar Dodson.

Robert W. Kenny, Atty. Gen., and Jas. O. Reavis, of Sacramento, for respondent.

ADAMS, Presiding Justice.

Appellants in this action, who have appealed separately and filed separate briefs, were charged by information with the crime of robbery in that they took from the person and immediate presence of one George Criss the sum of $30.00 by means of force and by putting said Criss in fear. They were tried jointly and both were convicted of robbery of the second degree. Both made motions for a new trial and for probation, which motions were denied.

On this appeal Terry contends that the evidence does not show that Criss was possessed of the money alleged to have been stolen, at the time of the alleged robbery, or that either of the defendants took said property from either the person of Criss or from his immediate presence, and that, therefore, the corpus delicti was not established by the prosecution. Dodson's contentions are practically the same.

[1-3] In considering these questions on appeal the following principles must be applied, to wit, that all presumptions in support of the judgment are to be indulged, and the evidence, so far as there is any conflict therein, is to be considered in the light most favorable to the prosecution; also that guilty participation may be shown by circumstantial as well as by direct evidence, and that if the circumstances shown by the evidence justify the conclusion of the jury a reviewing court has no authority to interfere therewith. See People v. Ekstrand, 28 Cal.App.2d 1, 3, 4, 81 P.2d 1045; People v. Anderson, 37 Cal.App.2d 615, 619, 100 P.2d 348; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631.

Considering the evidence in the light most favorable to the prosecution it shows that on the evening of January 26, 1946, Criss went to the Old Homestead Cafe, a dance hall in Sacramento, about 10:30 o'clock. At that time he had in his possession approximately $35.00. He drank a bottle of beer while watching the dancing, then struck up an acquaintance with a soldier by the name of Thomas. Together the two of them consumed two bottles of beer, and sat talking until 11:45 p. m. when the closing of the cafe was announced. Criss called a taxi and invited the soldier to go with him to get some chow mein. As they emerged from the cafe they were accosted by defendants, who offered to give them a ride to their destinations, and they accepted. Dodson produced his car which the four entered, Thomas occupying the front seat with Dodson, and Criss the back seat with Terry, the soldier presumably to be taken to the Signal Depot where he was stationed, and Criss to his home. They drove out 12th Street where Dodson turned and drove out along the levee. On the way either Dodson or Terry produced a pint bottle of whiskey and they all had a drink. A short time later they all got out of the car to have another drink, whereupon Terry immediately hit Criss a hard blow on the head, knocking him down over the levee and rendering him unconscious. According to the testimony of Thomas he saw Terry hit Criss a hard blow, Criss rolled down over the levee and was followed by Terry and Dodson. Thomas stated that he saw Terry standing over or near Criss down over the bank, with Dodson within a few feet of them, and that he then hastily departed from the scene. Criss stated that about 45 minutes later he recovered consciousness, and immediately felt for his money, which was in bills and change in his trousers pocket, but found that it was all gone. He then made his way to the police station in

North Sacramento and reported it to the police. The police officer in charge there testified that Criss had been beaten up, that his clothes were dirty and there was blood upon them, and there were cuts and bruises about his face. Both Criss and Thomas testified that there had been no arguments or disagreements at any time before Terry struck Criss.

Terry and Dodson testified in their own behalf stating that they left Criss at the foot of the levee and went to the "Showboat"; that Dodson stayed there for about five minutes and after playing one or two hands of poker left for his home. Terry testified that when he went to the Old Homestead Cafe he had but four cents in money, and a check for $400; that he still had the check which was "no good"; that after Dodson left the Showboat he remained there playing poker until 6:00 a. m., when he went to town. These two men had known each other for about a year. Neither had been employed recently. Terry had previously been twice convicted of burglary. Both denied taking any money from Criss, and their stories as to the events of the evening differed from those told by Criss and Thomas, but are not important here.

Both appellants argue that the foregoing evidence is insufficient to show that any crime was committed or that either of them committed it; that all it shows is that Criss had approximately $30 when he left the cafe, and that he did not have it when he recovered consciousness down on the levee; that Criss said he made no search for it there, and that there was no testimony that when he arrived at the police station he made any complaint that he had been robbed; that none of the property was found in the possession of defendants; and that the evidence is insufficient to support an inference that defendants or either of them took any money from Criss. They cite authorities which they argue support their theory; but the cited cases are readily distinguishable on the facts and need not be reviewed since we find sufficient authority to support the judgment.

The facts in People v. Barrow, 62 Cal.App.2d 590, 145 P.2d 42, are comparable. There the complaining witness testified that after attending a theater he walked up the street; that as he was passing a storage house he heard a groan coming from the entrance way which was dark; that he entered it and found defendant, a colored woman; that she put her arms around him, whereupon he pushed her away; that he started to walk out, felt for his wallet and found that it was missing; that he grabbed the woman and pulled her out on the sidewalk, stating that she had his wallet. She denied this and screamed, whereupon a colored man came up, and the woman walked away. The complainant followed her and a little later found her in company with the same colored man. He then called the police who took them to the police station. The wallet was not found in their possession, nor was it then found in the entrance to the storage house. But the following morning it was found behind a "No Parking" sign, attached to the doors of the storage house. Defendant was convicted of grand theft, and on appeal contended that there was no evidence to show that the complaining witness had his wallet on his person at the time he entered the entrance way, or to show that it was taken from him without his consent. The court affirmed the judgment of conviction, saying, 62 Cal.App.2d at page 594, 145 P.2d at page 44: "Assuming without deciding that there was no direct evidence on the subjects to which these claims relate, the only reasonable inference to be drawn from the complaining witness' testimony was that the wallet was on his person at the time and was taken by defendant without his consent."

In People v. Ferrara, 31 Cal.App. 1, 159 P. 621 (petition for hearing in Supreme Court denied), the evidence showed that one Duffy met defendant at a saloon in Stockton where they had several drinks, after which the two went to the boat landing for the purpose of going to San Francisco by boat. Because of Duffy's intoxicated condition he was denied passage, whereupon the two went to the Southern Pacific depot. On learning that a Santa Fe train would leave at 8:30, they started to walk to that station, defendant leading the way. They paused on the track to have a smoke, and when Duffy turned his head defendant struck him three times, finally rendering him unconscious, though he testified he had a faint recollection of someone going through his pockets. When he subsequently regained consciousness he found that $28 which he had had in his pocket was gone. It was contended on appeal that the corpus delicti was not proven and that the evidence was insufficient to show that the money taken was the property of Duffy. This court held the evidence sufficient to justify the jury in believing that the money was taken from Duffy's person by force and fear; and the latter's testimony that he had cashed two checks and the money in his pocket at the time he was struck was a part of the proceeds thereof, was held sufficient to show that the money was his property.

In People v. Gonzales, 6 Cal. Unrep. 263, 56 P. 804, 805, it was urged by defendant that the evidence was insufficient to show either that a robbery was committed or that he was guilty thereof. The evidence showed that one Santonette, while walking along the street with defendant and three others with whom he had had several drinks, was struck on the head by Gonzales and rendered unconscious. About fifteen minutes later, when he recovered consciousness, his purse containing about $40, and his watch, were missing. One Pitts said he saw Gonzales holding Santonette down, and believed from the way he acted that he went through his pockets, but that he did not see him do so. The stolen property was not found in Gonzales' possession but the court held that the evidence was sufficient to support the conclusion of the jury, saying: "Defendant urges that the evidence was circumstantial, and insufficient to show either that a robbery was committed or that he was guilty thereof. It is true that no one distinctly saw defendant rifle Santonette's pockets, nor was the property of Santonette found in defendant's possession; but the property was taken from him, the evidence tended to show, after he was knocked down, and before he recovered consciousness, and why was Gonzales 'holding him on the ground,' as Pitts testified? Hardly for the purpose of preventing violence at his hands, for, according to Santonette's testimony, he was then insensible. We are satisfied that this court is not warranted in interfering with the conclusion drawn by the jury from the evidence." Also see People v. Rodriquez, 31 Cal.App.2d 524, 88 P.2d 217; People v. Anderson, supra; People v. Robinson, 49 Cal.App.2d 576, 122 P.2d 77; People v. Del Prado, 49 Cal.App. 2d 597, 122 P.2d 76.

[4] It is said in 46 Am.Jur. 162: "Under the rule that all the elements of the corpus delicti may be proved by presumptive or circumstantial evidence, which prevails in most jurisdictions, it has been held that the commission of a robbery is sufficiently established by proof that the victim had valuables on his person at the time of being assaulted, beaten, and rendered unconscious, and that they were missing when he regained consciousness."

[5] The trial court in the instant case denied a motion for a directed verdict saying that the evidence was sufficient to go to the jury. It also denied motions for a new trial. In People v. Tedesco, 1 Cal. 2d 211, 219, 34 P.2d 467, the court said that it is the function of the jury, in the first instance, and of the trial court after the verdict, to determine what facts are established by the evidence, and before the verdict of the jury which has been approved by the trial court can be set aside on appeal upon the ground of the insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion of the trial court. Also see People v. Schneider, 36 Cal.App.2d 292, 295, 98 P.2d 215; People v. Perkins, supra; People v. Robinson, supra.

[6] We cannot say that upon no hypothesis is there no substantial evidence to support the verdict and the conclusion of the trial court, therefore the judgment and the order denying a new trial as to each of the defendants is affirmed.

PEEK and THOMPSON, JJ., concur.

77 Cal.App.2d 229

VIERNEISEL et ux. v. RHODE ISLAND INS. CO.

Civ. 15401.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1946.

1. Escrows ⚷12

Generally, where conditions fixed for delivery of a deed are not such as are certain to happen, merely depositing the deed with an escrow holder does not pass title to the grantee.

2. Escrows ⚷12

Where grantors had executed written escrow instructions and had delivered fire policy and deed to escrow holder on day before property was destroyed by fire, but grantees were not then entitled to receive the deed and conditions of escrow were not certain to happen, fire policy had not been assigned prior to the loss.

3. Insurance ⚷594

After a loss under fire policy has arisen, liability is fastened on insurer and any right of the insured as a result of the loss may be assigned.

4. Insurance ⚷328(2)

An option to purchase does not vest such an interest in optionee as to void a fire policy which provides that it shall be void in case of change of interest, title, or possession with the consent of the insured.

5. Insurance ⚷328(2)

Where property was destroyed by fire on day after grantor had executed written escrow instructions and had delivered fire policy and deed to escrow holder, but conditions of the escrow were not certain to happen and grantees were not then entitled to receive deed, grantors were sole and unconditional owners of property on date of the fire as required by terms of policy.

6. Insurance ⚷503

Where property was destroyed by fire on day after grantors had executed written escrow instructions and had delivered fire policy and deed to escrow holder, but conditions of the escrow were not certain to happen and grantees were not then entitled to receive deed, the grantors suffered a pecuniary loss as a result of the fire and were entitled to recover on fire policy.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action on a fire insurance policy by Frank Vierneisel and wife against Rhode Island Insurance Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

William K. Young, of Los Angeles, for appellant.

Lind & Schmitz, of Wilmington, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover a sum alleged to be due under the terms of a fire insurance policy, defendant appeals.

The material facts are these:

On June 1, 1944, defendant issued to Luigi and Luigia Ferrero, as assured, a policy of fire insurance indemnifying them against loss arising from destruction by fire of a dwelling house owned by them. On June 28, 1944, Mr. and Mrs. Ferrero and plaintiffs executed written escrow instructions to the Redlands Branch of the Bank of America regarding the sale of the insured property. Simultaneously with the execution of the escrow instructions Mr. and Mrs. Ferrero delivered to the escrow holder the fire insurance policy in question, and a deed conveying the real property to plaintiffs upon which the insured dwelling was located.

On June 29, 1944, the dwelling house was totally destroyed by fire and thereafter under a nonwaiver agreement the extent of the damage was established at $4,750.

On August 24, 1944, plaintiffs notified the Ferreros they had paid outside of escrow the sum of $200, had deposited $1,000 in escrow and they would deposit the further sum of $5,800 in escrow on account of the purchase price, but that they would not deposit further sums until the fire insurance claim was settled. On August 24, 1944, plaintiffs deposited $5,800 with the escrow holder, accompanied by amended instructions stating that they were to receive the proceeds from the fire insurance policy when the claim was settled.

On September 28, 1944, plaintiffs deposited in the escrow $5,020 which represented the balance of the purchase price and escrow charges. On or about October 6, 1944, the Ferreros deposited in the escrow an assignment of that portion of the insurance policy relating to the dwelling and also of their rights to claim indemnity for destruction of the dwelling house by fire. On October 27, 1944, the Ferreros' deed to plaintiffs was recorded and on November 9, 1944, plaintiffs received from the escrow the fire insurance policy, policy of title insurance, and the assignment of October 6, 1944. The fire insurance policy contained a provision that it could not be assigned without the consent of defendant. At no time was there a request that defendant consent to a transfer of the fire insurance policy to plaintiffs nor did defendant ever so consent.

The present suit was instituted to recover for the loss under the fire insurance policy.

There are four questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Were the Ferreros the legal owners of the premises on the date of the fire?*

This question must be answered in the affirmative. The property was destroyed on June 29, 1944. The escrow had been opened for the sale of the property to plaintiffs on the day before, June 28, 1944. However, the deed was not delivered to plaintiffs until October 27, 1944.

[1] It is the general rule that where conditions fixed for delivery of a deed are not such as are certain to happen, merely depositing the deed with an escrow holder does not pass title to the grantee. (Holman v. Toten, 54 Cal.App.2d 309, 313, 128 P.2d 808, and cases cited therein.)

In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed. Therefore on the date of the fire the Ferreros were the legal owners of the property which was destroyed.

Marr v. Rhodes, 131 Cal. 267, 63 P. 364, McDonald v. Huff, 77 Cal. 279, 19 P. 499, and Hawi Mill & Plantation Co., Ltd., v. Finn, 82 Cal.App. 255, 255 P. 543, relied on by defendant, are cases falling within an exception to the general rule above stated. In some cases where application of the general rule creates a hardship the courts indulge in a legal fiction holding that where the terms of an escrow have been complied with and a deed has been delivered, the delivery will be deemed to have been made as of the date of the delivery of the deed into escrow. In the present case there is no reason for the application of this legal fiction for in place of avoiding a hardship it would in fact work a hardship upon the insured.

[2] Second: *Was the policy of fire insurance assigned prior to the loss?*

This question must be answered in the negative. The fire insurance policy had been placed in escrow in 1944, but the instructions clearly negative any assignment as of that date. The pertinent portion of the instructions reads as follows:

"Assume that insurance premiums are paid and transfer on behalf of parties hereto any fire insurance policies as handed you. Forward such policies, upon close of escrow, to agent with the request that insurer consent to such transfer or attach Loss Payable on Mortgagee's Clause or other additions or corrections, and that agent thereafter forward such policies to parties entitled thereto."

For a case based on facts similar to those in the present case and holding that the right to recover on a fire insurance policy is not forfeited because a deed is placed in escrow awaiting performance of conditions precedent to the delivery thereof to the vendee see Pomeroy v. Aetna Insurance Co., 86 Kan. 214, 120 P. 344, 38 L.R.A., N.S., 142, Ann.Cas.1913C, 170.

[3] It is settled that after a loss has arisen liability is fastened upon the insurer

and any right of the insured as a result of the loss may be assigned with or without the consent of the insurer. (Ocean Acc., etc., Corp. v. Southwestern Bell Telephone Co., 8 Cir., 100 F. 441, 444, 122 A.L.R. 133; Davies v. Maryland Casualty Co., 89 Wash. 571, 154 P. 1116, 155 P. 1035, L.R.A. 1916D, 395, 398.) In the present case the loss occurred on June 29, 1944, and the assignment was not made by the Ferreros to plaintiffs until October 6, 1944.

Third: *Were the Ferreros the sole and unconditional owners of the destroyed property on June 29, 1944, the date of the fire?*

[4, 5] This question must be answered in the affirmative. An option to purchase does not vest such an interest in the optionee as to void an insurance policy which provides that it shall be void in case of a change in interest, title or possession with the consent of the insured. (Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 442 et seq., 89 P. 102, 119 Am.St.Rep. 234.)

Brickell v. Atlas Assurance Co., Ltd., 10 Cal.App. 17, 101 P. 16, is factually distinguishable from the present case. In the cited case the insured had entered into an agreement for the sale of his property, the purchase price was to be paid in installments and the purchaser had the right of possession. In such case the vendor did not have an absolute title, the equitable title being vested in the purchaser. At the time of the fire in the present case the plaintiff held merely the right to complete the terms of the escrow and thus become entitled to acquire the property. Therefore the instant case falls under the rule announced by our Supreme Court in Mackintosh v. Agricultural Fire Ins. Co., supra.

Fourth: *Did the Ferreros suffer a pecuniary loss as the result of the fire?*

[6] This question must also be answered in the affirmative. The board of appraisers established the loss in the sum of $4,750. In addition, the Ferreros assigned the right to collect this sum from defendant to the plaintiffs on condition that plaintiffs would deposit in escrow the balance due in the sum of $5,020. Clearly, there can be no question that the Ferreros suffered a pecuniary loss and that they assigned the rights to recover this pecuniary loss from defendant to plaintiffs.

Since the record is free from error, the judgment should be affirmed.

It is so ordered.

MOORE, P. J., and WILSON, J., concur.

77 Cal.App.2d 174

COSTELLO et al. v. ROER et al.

Civ. 15319.

District Court of Appeal, Second District, Division 1, California.

Dec. 6, 1946.

1. Appeal and error 🔑1010(1)

Where judgment appealed from is attacked as not supported by evidence, appellate court's power ends when it determines that there is substantial evidence supporting trial court's conclusions.

2. Sales 🔑52(7)

Evidence supported judgment rescinding and cancelling contract for sale of hotel business on ground of seller's fraud in falsely representing that hotel had good reputation and charged no more than OPA prices.

3. Sales 🔑38(1)

False representations of one contracting to sell hotel that it had good reputation and charged no more than OPA prices were of such nature, weight and force that contract would not have been made without them and hence were material, so as to authorize rescission of contract by purchasers.

4. Fraud 🔑18

A misrepresentation is "material," if it would be likely to affect reasonable man's conduct with reference to transaction in question.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Misrepresentation".

5. Sales 🔑52(7)

Evidence that persons contracting to purchase hotel from one falsely representing that it had good reputation and charged no more than OPA prices did not get kind of hotel bargained for and that seller retained portion of purchase money paid by purchasers was sufficient to establish material injury to purchasers, so as to entitle them to rescission of contract for fraud. Civ.Code, § 1689 subd. 1.

6. Contracts 🔑99(3)

To establish material or appreciable injury, entitling plaintiff to rescission of contract, evidence that plaintiff is in worse position than he otherwise would have been is sufficient. Civ.Code, § 1689 subd. 1.

7. Costs 🔑154

Parties recovering judgment rescinding their contract to purchase hotel on ground of seller's fraud were entitled to recover commissioner's fee for taking of plaintiffs' depositions in another state as item of costs. Code Civ.Proc. § 1032a.

8. Appeal and error 🔑936(1)

On defendant's appeal from order denying his motion to tax costs by striking from plaintiff's cost bill an item claimed as commissioner's fee for taking plaintiff's depositions in another state, appellate court must assume that trial court gave due consideration to both propriety of such item and amount of charge. Code Civ. Proc. § 1032a.

Appeal from Superior Court, Los Angeles County; John Gee Clark and Alfred E. Paonessa, Judges.

Action by Maurice Costello and others against Alex Roer and others for rescission of a contract for sale of defendants' hotel business to plaintiffs and for money had and received. From a judgment for plaintiffs and an order denying defendants' motion to tax costs, defendants appeal.

Affirmed.

A. A. Rotberg, of Los Angeles, for appellants.

Ben H. Rudnick (of Behrstock & Rudnick), of Los Angeles, for respondents.

DORAN, Justice.

The present action is one seeking rescission, on the ground of fraud, of a contract involving the purchase of a hotel business operated by appellant and sold to the respondents. The record discloses that negotiations therefor were commenced about September 24, 1943, culminating in a written agreement of sale dated September 30, 1943, under which the lease, equipment, etc. of the St. Mark's Hotel in Venice, California, were sold to respondents for $17,500, payable $7,000 down, balance in monthly installments. Respondents gave appellant a cashier's check for $5,000 which was duly paid; and two checks for $1,000 each, payment of which was stopped. Another check for $282.74, covering adjustments in rent, etc. was also paid. Respondents operated the hotel until October 8, 1943.

The respondents' testimony was to the effect that during the initial conversations concerning the proposed purchase, appellant was informed that the purchasers desired a hotel of good reputation, and that "The class of people that live in the hotel mean a good deal to us", to which appellant replied, "You are bying a first class hotel, * * * If you buy this hotel you buy a legitimate business. I tried to work up a good class of people. I am careful not to permit any prostitutes or riff-raff. The hotel has as good a reputation as any other first class hotel". Appellant was further asked, "Do you always charge patrons according to OPA prices", and replied, "Of course I do. Do you think I would be foolish enough to tangle with the Federal Government?" It further appears that Mrs. Arlen Costello, wife of one of the purchasers, then said, "Well I want you to know that if you have been having any trouble with the OPA or if we have to charge illegal prices in order to make a go of it, we just don't want the place", to which Roer replied, "You don't have to worry your head about that, because I've always followed OPA rules strictly and made a good living out of it". The appellant first testified that no statement was made about the reputation of the hotel, but later said: "They asked me about the reputation. I said, 'We are living here about seven and a half years—about seven years at that time. We always have a fine hotel, legitimate business. We have nice people coming in, registering. We also have families living in the hotel with boys' ".

According to respondents' testimony, after the money had been paid on September 30, 1943 and respondents had taken over the hotel, the appellant then, for the first time, imparted information indicating that the income, amounting to some $21,000 annually, was in part derived from overcharges in excess of OPA rates, exacted from soldier boys and others; and that at least one prostitute was not only tolerated in the hotel, but deemed a desirable tenant. This information included advice that unauthorized, extra, "service" charges could be safely made, and that "If you make up a good enough story they (OPA) wont bother you"; that sometimes double the OPA ceiling price would be charged—the room occupant being checked in for one day and charged on the records for two days; that single guests were charged the double guest rate "by having him sign 'and wife', or 'party' ". In reference to the latter practice, Maurice Costello testified that, "A man came in who had a uniform on, either a sailor or a merchant marine, and asked for a room for himself. Mr. Roer said, "We have nothing but double rooms and we will have to charge you double. * * * Mr. Roer * * * told him to register his name 'and wife'. Mr. Roer smiled. 'Thats all right; you will find yourself some cutie on the beach'. * * * Mr. Roer said to me, 'See how easy it is? Thats the way to make a dollar'." The record discloses substantially similar testimony by Maurice and Albert Costello concerning appellant's reference to a prostitute occupant of the hotel. Maurice Costello testified to the following conversation with appellant after respondents had taken over the hotel:

"Then he pointed out a card for 'Bobbie Fafee' and told us in a quiet tone of voice, 'You might not like this girl, but she is a good customer. She is good for as many as six or seven rooms a day'; and my wife asked him 'What do you mean by that?' Mr. Roer said 'Don't be a baby. She is a prostitute.' I then said to Roer, 'I thought you sold us a legitimate hotel. We don't want to get into anything like this.' He answered like this, 'Don't be a damn fool. You will never make any money if you are going to be schlemiel.' I said, 'Well, I don't think we can do business that way in any hotel we are running.' "

Concerning the same conversation, Albert Costello testified that it took place "the very night he took possession. He broke in my brother how to operate the hotel, October 1st, the latter part of the afternoon. It was about four o'clock or so."

Respondents testified that on October 2, 1943, appellant was advised that the hotel had been misrepresented and that respondents desired to rescind. The respondents continued to operate the hotel, however, until October 8, 1943, at that time serving a notice of rescission upon appellant. Respondents then relinquished the hotel to appellant, a written agreement being executed which recited the claims of the respective parties and appellant's refusal to accept respondents' rescission or to refund the amount paid.

In reference to the alleged misrepresentation that OPA rules had been observed, Albert H. Schaeffer, hotel clerk between December, 1942 and April, 1943, testified that prices in excess of posted ceiling prices, were charged "right along on week ends when Mr. Roer was with me on the desk"; further, that Roer said, "I get all the money I can while the getting is good." There was also evidence that in October, 1943, an accountant was engaged in auditing the hotel books in connection with an OPA investigation. The report of this accountant, submitted on October 22, 1943, showed, according to appellant's brief, a total of 567 violations and 60 registrations unaccounted for, covering a period between November 1, 1942 and May 5, 1943. Respondents further produced a letter, admittedly signed by appellant, dated October 9, 1943, addressed to the Office of Price Administration, reading in part as follows: "I hand you herewith check in the sum of $911.50. * * * This sum represents a voluntary contribution to the United States

Treasury on my part. It represents the amount of overcharge collected by me in operating rental property at 15 Windward Avenue, Venice, California."

On October 22, 1943 respondents filed a complaint against appellant containing two counts; one for rescission and cancellation on the ground of fraud, the other for money had and received in the sum of $4,845.54, being the difference between the amount paid to appellant and receipts during the week the hotel was operated by respondents. After trial before a judge, a jury having been waived, the trial judge found that prostitutes had not been barred from the hotel and that at least one prostitute was allowed to use the hotel with appellant's knowledge and consent; that at the time of the sale appellant was receiving excessive rentals in violation of OPA regulations; and that for approximately one year prior to the sale to respondents, the gross income of the hotel had not been obtained through its operation on a strictly legal basis, "but on the contrary had been obtained through the operation of said hotel in violation of law and the rules and regulations of the Office of Price Administration". Judgment was accordingly rendered in favor of respondents for rescission and cancellation, and for the amount claimed; from which judgment the present appeal is prosecuted.

[1, 2] The appellant's brief states the questions involved as follows: "Will a judgment rescinding a contract for fraud be affirmed on appeal where the findings are not supported by the evidence, and where no damage was proven and no finding of damage was made." The rule in reference to appellate consideration of this point is well known, and is stated in Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3, 6, as follows: "It is fundamental that where a judgment is attacked on the ground that it is not supported, the power of the appellate court ends when it shall once have determined that there is substantial evidence which will support the conclusions of the trial court." See also Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478. That the record in the instant case contains substantial evidence supporting a judgment for the respondents, cannot well be doubted. Although the alleged fraud was categorically denied by the appellant, the above mentioned rule still obtains.

[3, 4] Appellant's contention that "The representations were not material" is without merit. Under the definitions of materiality contained in the cases cited by appellant, there can be no doubt that the alleged misrepresentations, if made by Roer, were " 'Of such nature, weight, and force that the court can say, "Without it the contract would not have been made." ' " Oppenheimer v. Clunie, 142 Cal. 313, 319, 75 P. 899, 901. As said in appellant's quotation from the Restatement of the Law, Restitution, Sec. 8(2): "A misrepresentation is material if it would be likely to affect the conduct of a reasonable man with reference to the transaction in question". And, as pointed out in respondent's brief, the gist of the present controversy does not relate to the amount of the hotel income, but to the fact that such income was improperly derived. If respondents' testimony is to be believed, the legitimate source of the income was a matter of primary importance to the purchasers, and the seller was directly so advised at the very inception of the negotiations. According to the appellant's own testimony, the purchasers, were assured that "We always have a fine hotel, legitimate business. We have nice people coming in, registering." Had appellant then advised the Costellos that the income was in part derived from illegal overcharges, toleration of prostitute guests and falsification of records; that an OPA investigation was expected or pending; or, indeed, any one of such facts, it can hardly be doubted that such matter "would be likely to affect the conduct of a reasonable man with reference to the transaction".

[5, 6] The further contention that "No grounds for rescission exist unless material or appreciable injury are proven", and that plaintiffs failed to plead or prove, and the court failed to find, any such damage, cannot be sustained. There is evidence that the respondents did not get the kind of a hotel bargained for; moreover, the appel-

lant retained $4,845.54 of the respondents' money. As said in 12 Cal.Jur. 766, "It is sufficient to show that the plaintiff is in a worse position than he otherwise would have been". In Vulcan Fire Ins. Co. v. Jorgensen, 33 Cal.App. 763, 767, 166 P. 835, 837, it was held that misrepresentations that a certain bank president was to be connected with plaintiff company, "Are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered", the court observing that this rule "is well settled". This language was quoted with approval in Munson v. Fishburn, 183 Cal. 206, 218, 190 P. 808. In this connection it may be noted that Section 1689(1) of the Civil Code, relating to rescission, merely requires that "the consent of the party rescinding, or of any party jointly contracting with him, was given by * * * fraud", and contains no requirement for a showing of damage. The case of Powell v. Rockow, 1933, Tex.Civ.App., 58 S.W.2d 536, 538, cited by respondents, is not dissimilar to the instant controversy. There the plaintiff purchased a hotel business upon fraudulent representations that the hotel had a lucrative patronage, and that its patrons were of good reputation. It was there held that the purchaser might rescind, and the court said: "There is no merit in the contention that appellees had to show a loss before they could have rescission of the contract. They contracted for a decent hotel, and under their testimony the Angelus Hotel was nothing more than a cheap bootlegging joint and assignation house".

[7, 8] The defendant has also appealed from an order denying a motion to tax costs by striking an item of $150 from plaintiff's cost bill, claimed as a commissioner's fee for the taking of the depositions of Maurice Costello and Arlen Costello at Norfolk, Virginia. As noted in respondents' brief, Section 1032a of the Code of Civil Procedure provides that a party shall be allowed as costs the reasonable cost of taking and transcribing depositions. The appellant's motion to strike this item merely alleged that it was not a "proper item of costs chargeable in this action", and did not claim that the amount was unreasonable. Appellant's brief now appears to concede that the item was proper but that the amount allowed was not reasonable. As appellant states, "On the motion to tax costs, the court had before it all the pleadings, files and papers in said action and the minutes of the court. The depositions were on file. The Cost Bill showed the expense of the shorthand reporter who took and transcribed the deposition." This statement, itself, is an answer to the contention, and it must now be assumed that, in passing on this matter, the trial court gave due consideration both to the propriety of the item and the amount of the charge. If appellant's objection was that the charge was unreasonable, the motion should have been one to reduce the amount, with a proper showing in that regard.

For the reasons hereinbefore stated, the judgment and order appealed from are affirmed.

YORK, P. J., and WHITE, J., concur.

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77 Cal.App.2d 64

WINFIELD v. CHARLES.

Civ. 15446.

District Court of Appeal, Second District, Division 3, California.

Nov. 29, 1946.

1. Trade-marks and trade-names and unfair competition 🔑75

In action to enjoin the use of a name, on ground of unfair competition, it is unnecessary to show that any person has been confused or deceived, but it is the likelihood of deception which the remedy may be invoked to prevent. Civ.Code, § 3369.

2. Trade-marks and trade-names and unfair competition 🔑67

If injury to plaintiff's business is threatened or imminent because of unfair competition by defendant, the court is authorized to intervene to prevent its occurrence. Civ.Code, § 3369.

3. Trade-marks and trade-names and unfair competition 🔑10, 71

Surnames may not be appropriated as trade-marks, but long association of a name with a product may result in that name taking on a new or secondary meaning, which meaning submerges the primary meaning of the word as a man's name merely and the new meaning survives as identification, in the market, of a product and its source.

4. Trade-marks and trade-names and unfair competition 🔑93(1)

Where the purpose of action is to secure injunctive relief against unfair competition, actual market competition need not always be proved. Civ.Code, § 3369.

5. Trade-marks and trade-names and unfair competition 🔑71

In the interest of fair dealing, courts of equity will protect the person first in the field doing business under a given name to extent necessary to prevent fraud on his business and on the public and for that purpose the second in the field may be enjoined from using the name, even though the principal places of business are at a considerable distance from each other. Civ.Code, § 3369.

6. Trade-marks and trade-names and unfair competition 🔑99

Unfair competition is a question of fact and the universal test question is whether the public is likely to be deceived.

7. Trade-marks and trade-names and unfair competition 🔑93(3)

In action to enjoin defendant's use of name "Winfield", evidence sustained finding that there was fraud, deceit, or unfair practice on part of defendant, that there was competition between plaintiff and defendant, that there was damage or prospective damage to plaintiff, and that the name "Winfield" had acquired a secondary meaning in the automotive industry. Civ.Code, § 3369.

8. Trade-marks and trade-names and unfair competition 🔑97

Where plaintiff had established a reputation for reliability and meritorious products under trade-mark "Winfield" and defendant had engaged in unfair practice, defendant's use of the name "Winfield" or any simulation thereof was properly restricted. Civ.Code, § 3369.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Edward A. Winfield against Emerson Winfield Charles to enjoin defendant from using the name "Winfield Manufacturing Company" or any abbreviation thereof and from using the name "Winfield" or any simulation thereof as a part of any name used by him, excepting the name Emerson Winfield Charles. From an adverse judgment, defendant appeals.

Affirmed.

Marco & Teschke, of Beverly Hills, and Samuel H. Sherman, of Los Angeles, for appellant.

Harry G. Sadicoff, of Los Angeles, for respondent.

WOOD, Justice.

Defendant Emerson Winfield Charles appeals from the judgment in favor of plaintiff Edward A. Winfield which enjoins defendant from using the name "Winfield Manufacturing Company" or any abbreviation thereof, and "from using the name 'Winfield' or any simulation thereof, as a part of any name used by him, excepting the name of Emerson Winfield Charles."

Appellant contends that findings of fact are not supported by the evidence.

Plaintiff is a mechanical engineer, designer, and manufacturer of combustion engines, and various parts for them. His carburetors, which bear the name "Winfield" and are known by that name, were introduced into automobile racing in 1923, and since 1925 have been used almost exclusively by automobile racing drivers. Over a period of years the Winfield Carburetor received a great amount of publicity in newspapers, magazines, and automotive journals for superior performance in connection with fast automobiles. Other parts, developed by plaintiff, which were frequently used in racing automobiles were cams, camshafts and cylinder heads. Plaintiff's carburetors were adaptable for use in all motors, and his products have also been used in racing boats, passenger automobiles, trucks, small airplanes, and for industrial purposes.

Plaintiff was also a well-known automobile racing driver and, it appears, from 1921 to 1927 won several races while using his carburetors and camshafts. Clippings from newspapers were introduced in evidence which show that plaintiff and his products received much favorable publicity as the result of such activity. There was testimony that the automobiles that won the Indianapolis races invariably used Winfield Carburetors in their motors; that over a period of years the automotive trade journals have contained news items which were complimentary to plaintiff; that the name "Winfield" was the most prominent factor in advertisements of Winfield equipment in periodicals and magazines; that plaintiff was well known as a camshaft specialist, and was well known in the world for manufacturing other parts for combustion engines; that the name "Winfield" is synonymous with the development of "internal motors"; that the name "Winfield" was known in France, England and Italy in connection with automobile motors; that plaintiff was always referred to as "Winfield"; that the Ford Motor Company experimented with the Winfield Carburetor for use in its Model T Ford, and it proved to be better than the one they had been using; that plaintiff made tortional vibration dampeners for Model A Fords; that he designed an engine for buses for the Twin Coach Company of Kent, Ohio, about 2 years ago; that at the time of the trial he was designing a new Diesel engine for the Twin Coach Company which was to be built under Winfield patents; that the coach company's rights to said engine are to be limited to its particular field, and plaintiff is to retain the rights for all other fields; and that he intends to build said engine under the name "Winfield" at some time in the near future.

The evidence shows that plaintiff began engineering and designing when he was 13 or 14 years of age, and commenced the development of carburetors and various parts for engines; that he did experimental work until about 1920, when he went into partnership with one Durant in a machine shop and automobile repair business in Glendale under the name "Winfield and Durant"; that they also did business as "Winfield Inventions, Ltd."; that the carburetor was developed soon after the formation of that partnership, and it was called the "Winfield Carburetor"; that it had been known by that name ever since; that the partnership was discontinued about 1923, and plaintiff went into business in LaCanada, under the name "Edward A. Winfield," designing and producing parts for combustion engines; that everything he made carried the name "Winfield." At this time there was a company in Glendale by the name of "Winfield Carburetor Company," owned by one Morrow who was licensed by plaintiff to manufacture the Winfield Carburetor on a royalty basis. In 1937 or 1938 plaintiff moved to his present place of business which he owns. In 1939 plaintiff acquired all the interest in the Winfield Carburetor Company and, thereafter, caused a sign to be painted on the front of his building and one on the side, each of which read: "Winfield Carburetor & Manufacturing Co." Each sign consisted of 2 lines with the name "Winfield" in large letters forming the first line, and the balance of the name in small letters forming the second line. Plaintiff testified that since 1939 he has been the sole owner of this business, but has been unable to manufacture his products since this country entered the war; that at the time of the trial he was making arrangements "for continuing" the business.

Defendant went into the radio business in Spring Valley, Illinois, in 1926, using the name "Winfield Radio Supply Company." Previous to that time he had always used the name "Emerson W. Charles." In 1941 defendant quit business in Illinois, and came to Los Angeles. From May, 1941 to May, 1942, defendant was in the radio service business at 1230 West Olympic Boulevard under the name "Winfield Radio." In May, 1943, defendant went into business at 1818 West 9th Street in Los Angeles, doing war contract work under the name "Winfield Manufacturing Company," and made electrical parts, bomb rack holders, some bomb parts, did punch press work and some electronic work. The evidence shows that defendant had the name "Winfield" in rather large letters in gold leaf on each window, and below that in very small letters "Winfield Manufacturing Co." In December, 1944, while engaged in such war work, defendant moved to his present address in Glendale, a few blocks from plaintiff's place of business, and a portion of his building may be seen from plaintiff's building. Defendant caused signs to be painted on his building—one on the front and one on the side, each of which read "Winfield Manufacturing Co." in very large letters. Defendant testified that he moved to his present address because his business had grown to such proportions the quarters on Ninth Street were too small; that at the end of the war he began receiving "cut-backs" in his orders and he changed to other fields of manufacture; that he made automobile jacks and socket wrenches which went to customers with "priorities," such as Sears Roebuck and Montgomery Ward; that the jacks and wrenches carried no identification marks as to the source of manufacture; that he made about 1,000,000 key blanks in 1944 for one Reynolds who did business under the name "Winfield Sales and Service Co."; that Reynolds had no place of business of his own, and "borrowed" desks from defendant and used defendant's telephone; that Reynolds had cards printed with defendant's telephone number on them, but defendant "made him quit using them"; that at first defendant put his name, "Winfield Manufacturing Company, L. A." on the keys, but Reynolds forced defendant to discontinue that practice after 50,000 to 100,000 had been stamped.

Appellant contends that the evidence does not sustain the following findings: That there was fraud, deceit or unfair practice on the part of defendant; that there was competition between plaintiff and defendant; that there was any damage or prospective damage to plaintiff; and that the name "Winfield" had acquired a secondary meaning in the automotive industry.

This action is based upon alleged unfair competition on the part of defendant. Section 3369 of the Civil Code declares that unfair competition includes, among other things, "unfair *or* fraudulent business practice." (Emphasis added.) The evidence hereinabove set forth shows that plaintiff, over a period of 25 years, has established a wide and honorable reputation as an expert in the design and manufacture of combustion engines and their various parts; that his products over this period have been designated and known by the name "Winfield"; that he won renown as a racing driver, and the name "Winfield" is closely associated with fast motors. Furthermore, there was evidence that over the period of years plaintiff had expended large sums of money in advertising his products; that he first used his products in racing automobiles for advertising purposes, and expended large sums of money doing special work on the automobiles which he drove in the races; that he expended great sums of money in designing, developing and patenting his inventions; that his patents represent an investment of approximately $25,000; that his patents pending represent an investment of over $5,000; and that over a period of 20 years plaintiff had approximately 10,000 catalogs printed, and distributed them to "Winfield dealers all over the country," and sent some to Europe. One of the catalogs was introduced in evidence. It was a loose-leaf catalog over ½ inch thick, and measured approximately 8½ by 11 inches. It contained photographs, prices, and directions for installing numerous types of Winfield Carburetors in various automobiles, including those made by General Motors, Ford, Chrysler, and many others. It also contained descriptions and prices of other parts for engines, of wrenches and of screw drivers produced by plaintiff.

Although defendant used the name "Winfield" in his business since 1926 in connection with radios and radio service, the evidence shows that when he began using the name, "Winfield Manufacturing Company," he for the first time, used the word "Winfield" set apart as is plaintiff's custom, that is, with "Winfield" forming the top line of a 2-line name. About 2 months after defendant started using the name "Winfield Manufacturing Company," plaintiff learned about it and immediately had his attorney write defendant a letter demanding that defendant cease using the name "Winfield," and explaining that plaintiff owned the registered trademark "Winfield," had the prior right to its use, had been using it in his business for over 20 years, and had developed it to the point where it had become a valuable asset. Defendant received but ignored the letter and, thereafter, moved his business to a place about 2 blocks "in a straight line" from plaintiff's place of business, and there displayed the name "Winfield Manufacturing Co." along the side and front of his one-story building in large letters. It appears from photographs in evidence that the height of the letters along the side of the building are more than ⅙ the height of the side wall, and that the height of the letters along the front of the building are more than 1⁄12 the height of the front wall. A sheet from the 1945 telephone directory was introduced in evidence, and it shows plaintiff's name listed as: "Winfield Carburetor Co."; "Winfield Edward A [then following in smaller type] Winfield Carburetor Co"; and "Winfield Mfg Co [then following in smaller type] Winfield Carburetor Co." Defendant was listed therein, between the last 2 listings of plaintiff, as "Winfield Manufacturing Co." It also shows that plaintiff and defendant had telephone numbers preceded by the prefix "Citrus." It is not only reasonable to suppose that confusion would result from such listings, and from the proximity of the plaintiff's and defendant's places of business, but there was evidence that defendant had received telephone calls relating to plaintiff's products, and that plaintiff had received telephone calls relating to defendant's products. Defendant and one of his employees testified that when they received calls which were meant for plaintiff, they informed the callers of the mistake. Two witnesses called on behalf of plaintiff, one a man whose business is one block from that of defendant and the other a consulting engineer, testified that they at first thought defendant's place of business was plaintiff's.

[1-4] It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent. Schwarz v. Schwarz, 93 Cal.App. 252, 255, 269 P. 755. "It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence." Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 497, 258 P. 630, 635. Although surnames may not be appropriated as trademarks, "Long association of a name with a product results in that name taking on a new or secondary meaning, which meaning submerges the primary meaning of the word as a man's name merely, and the new meaning survives as the identification, in the market, of a product and its source." J. A. Dougherty's Sons v. Dougherty, 1940, D.C., 36 F.Supp. 149, 151. Both plaintiff and defendant are engaged in the manufacturing business, both have well-equipped machine shops, and it appears that both have machinery adaptable to manufacture articles other than those they at present manufacture. Appellant argues that the record shows that plaintiff and defendant do not manufacture the same articles or solicit the same trade and customers. Plaintiff's name has become a valuable asset in connection with any equipment associated with automobiles, and the evidence shows that the bulk of defendant's business is manufacturing automobile jacks and wrenches. However, it is not always necessary to prove actual market competition where the purpose of the action is to secure injunctive relief. It was stated in Wood v. Peffer, 55 Cal.App.2d 116, at page 122, 130 P.2d 220, 224: "'We are aware, however, that equity may be invoked with-

out market competition. Emphasis should be placed on the word "unfair," rather than "competition." ' "

[5-8] Plaintiff has established a reputation for reliability and meritorious products. If articles which are not produced by him are attributed to him or associated with his name, the injury is obvious. The court stated in the case of Del Monte Special Food Co. (Appellee) v. California Packing Corporation (Appellant), 9 Cir., 34 F.2d 774, at page 775: "The injury to the appellee by the use of the Del Monte Brand by the appellant does not result from preventing sale by appellee of oleomargarine of its own, *but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control.* Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production." (Italics added.) Furthermore, in the interest of fair dealing courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. For this purpose the second in the field may be enjoined from using the name, even though the principal places of business are at a considerable distance from each other. Benioff v. Benioff, 64 Cal.App. 745, 748, 222 P. 835. "No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. * * * The universal test question is whether the public is likely to be deceived." 63 C.J. 414; Pohl v. Anderson, 13 Cal.App.2d 241, 242, 56 P.2d 992. There was substantial evidence to support the findings of the trial court.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. NORINS REALTY CO., Inc., et al.

L. A. 19366.

Supreme Court of California, in Bank.

Dec. 17, 1946.

Rehearing Denied Jan. 14, 1947.

Taxation ⚿593(3)

Evidence sustained finding that salesmen of realty company were "independent contractors" and not "employees" within Unemployment Insurance Act, where company had no control over sales, no contracts were made with salesmen except as to commission, and they were not subject to any mandatory rules or instructions, and had no fixed hours of work. Gen.Laws Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the California Employment Stabilization Commission against the Norins Realty Company, Inc., a corporation, and others to collect unemployment insurance contributions. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Prior opinion 169 P.2d 955.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., of Sacramento, for appellant.

Maurice Gordon, of Los Angeles, for respondents.

EDMONDS, Justice.

Substantially the same question as was decided in California Employment Stabilization Commission v. Morris, 28 Cal.2d 812, 172 P.2d 497, is again presented for determination. In considering the status of certain salesmen and brokers associated with Norins Realty Company, Inc., in the sale of real estate, contrary to the contentions of the commission, the superior court held that these persons were independent contractors and not employees. The commission's appeal is from the judgment entered accordingly.

The action was brought under the Unemployment Insurance Act, Stats.1935, p. 1226, as amended, 3 Deering's Gen.Laws, Act 8780d, for the collection of contributions and interest alleged to be due from the realty company for the calendar years 1936 and 1937. It appears without question that the corporation engaged the services of 67 persons, all of whom were either salesmen or brokers licensed by the California Real Estate Commission, to sell real property owned by it. This propery consisted principally of lots in subdivisions which the company had placed on the market.

The president of the corporation, who had been connected with it since 1925 and, during the taxable period for which contributions are claimed was its secretary and treasurer, stated in detail the circumstances under which the services of the salesmen and brokers were engaged and the manner in which they conducted their operations. No distinction was made between a broker and a salesman in the functioning of the sales organization. There was no written or oral contract with any member of the sales force except as to the amount of the commission he would receive and the time of its payment. An employment card offered in evidence was identified by this witness as a form which had been used for a short time in 1929 or 1930 and was then discontinued.

The corporation did not bear any part of the expense incurred by the salesmen in their work, compensation being entirely on a commission basis. It did not furnish them with transportation, office facilities, desk space, telephone service, or business cards. However, there were available to either customer or salesmen, maps and a pamphlet which contained pictures of the lake and cottages on one of the subdivisions and of a clubhouse proposed to be built. The salesmen were also furnished with a price list.

There were no rules or regulations with regard to the activities of the salesmen; and they were not instructed as to the manner in which the sales were to be made. But, according to the witness, "They were told that we did not expect them to make misrepresentations." They were not required to attend sales meetings but some such meetings, characterized as impromptu "get-togethers" were held. No one was given an exclusive sales right in any particular territory, nor were restrictions imposed as to canvassing a stated territory at a particular time or with certain frequency. On the contrary, the company made no demand upon a salesman to devote a stated time to the business or that he produce a minimum volume of sales, and there were no fixed hours of employment.

No direction was given the salesmen to make a stated number of calls on a prospect, nor were they asked to interview any particular person. They were not required to keep a record of the business transacted or to report the nature of their activities. They were not expected to, nor did they, collect accounts, investigate complaints or credit ratings, or make adjustments. There was no rule restricting the salesmen's activities to the property of the corporation or prohibiting them from being employed elsewhere, and the corporation's officers knew that some of them were engaged in other work while they were offering the corporation's property for sale. No drawing accounts were given nor any advances made. However, personal loans and a few company loans were made to some of them.

The witness relied upon by the state to establish the corporation's liability was Mrs. Leila Nathanson, a member of the corporation's staff in 1938. She testified that her work consisted of obtaining prospects for the purchase of the corporation's property, but that she turned over the names of such persons to other salesmen or brokers. She did not close any deals. The only thing she remembered about a contract between her and the corporation was that it concerned "just our commission." When shown the employment card which has been referred to, she stated that it was about the same as the one she signed. However, no such card bearing her signature was produced and she explained that "it has been quite a long while since I worked there. I have forgotten all this." The testimony of the corporation's president is that she signed no written contract.

Mrs. Nathanson told the court that she used the telephone very little. She did not remember whether she paid for business cards of the Norins company upon which she wrote her name. No automobile was furnished for her use, nor was any allowance made to her for gasoline. The Norins company did not pay for the insurance on her automobile nor for her real estate license. No names of prospective customers were supplied to her. Other testimony given by her was in substantial accordance with that of the company's president. Upon this evidence the trial court found that the salesmen and brokers were independent contractors.

The contentions of the parties in the attack upon and defense of the judgment in favor of the corporation are essentially the same as those made in the Morris case, and the principles there stated and applied are controlling here. There is substantial evidence to support the finding of the trial court that the salesmen and brokers were independent contractors. This evidence shows that the corporation had no right to control, nor did it, in practice, control the manner or means by which the lots were sold. No written or oral contracts were made with the salesmen or brokers except as to the amount of their commissions. They were not subject to any mandatory rules, regulations, or instructions. They had no fixed hours of work, nor were they required to devote any particular time to the business. No minimum volume of business was required. Some of the salesmen were engaged in other activities while working for the corporation. In regard to the factors of supplying instrumentalities and a place to perform the services, although maps and pamphlets were available, the salesmen were not furnished offices, desk space, telephone facilities, transportation, or business cards, and the method of payment was by the job. These working conditions entirely negative the relationship of employer and employee.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 414

WEST v. EVANS.

S. F. 17237.

Supreme Court of California, in Bank.

Dec. 17, 1946.

Rehearing Denied Jan. 14, 1947.

1. Adverse possession ⚿13

To establish title by adverse possession, claimant's possession must be by actual occupation under circumstances constituting reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title or claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed on property during such period. Code Civ.Proc. § 321 et seq.

2. Adverse possession ⚿16(1)

"Actual possession", necessary to establish title to realty by adverse possession, means subjection to claimant's will and dominion, and must be coupled with acts of ownership proclaiming to world and bringing notice to owner that a right is claimed in realty. Code Civ.Proc. § 321 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Possession".

3. Tenancy in common ⚿15(7)

Where a wife continued to live on real property after date of interlocutory divorce decree, awarding each spouse undivided interests therein until her death, and her adopted son occupied it with her until his marriage, he acquired no title thereto by adverse possession as against spouses' surviving children. Code Civ.Proc. § 321 et seq.

4. Adverse possession ⚿88

Payment of taxes on realty by one claiming title thereto by adverse possession is not an act of ownership equivalent to possession of property, but is additional requirement for acquisition of such title. Code Civ.Proc. § 325.

5. Tenancy in common ⚿15(7)

One cotenant's exclusive occupancy of common property is deemed permissive and does become adverse to tenant out of possession until he has either actual or constructive notice that such possession is hostile to him. Code Civ. Proc. § 321 et seq.

6. Tenancy in common ⚿15(11)

Recordation of deed, purporting to convey entire property in land to tenant in possession thereof, is not notice to his cotenant of adverse character of such possession as matter of law and independent of any other fact.

7. Tenancy in common ⚿15(10)

Evidence did not support trial court's findings that grantee in widow's deed of realty, in which she owned undivided interest as one of several tenants in common, obtained title thereto by adverse possession, where only act on which grantee could rely to give notice to cotenants of his claim of ownership was recordation of such deed. Code Civ.Proc. § 321 et seq.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by George Randall West against Meta J. Evans, as administratrix of the estate of James West, deceased, to quiet title to realty, in which defendant filed a cross-complaint to quiet title to a fourth interest in deceased's estate and recover one fourth of the rental value of the property. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 167 P.2d 491.

James P. Montgomery, of Oakland, for appellant.

Eugene T. Nebiolo, of Oakland, for respondent.

EDMONDS, Justice.

George Randall West, the adopted son of Melinda West, is the grantee in a deed made by her. At the time of the conveyance, the grantor owned only an undivided interest in the property as one of its owners in common. He bases his claim of title to the entire parcel of land upon his possession of it since the recordation of the deed and the payment of taxes by him during that time. The appeal from the judgment in his favor concerns the applicability of the doctrine of adverse possession under these circumstances.

In 1917, Melinda secured an interlocutory decree of divorce from her husband, James. By the decree, Melinda was awarded an undivided three-quarter interest and James an undivided one-quarter interest in the real property which is the subject of this action. James and Melinda had four children. No final decree was rendered in the divorce action and James died intestate in 1919.

At the time of the divorce proceedings, the respondent was living with James and Melinda. Thereafter he and Melinda continued to occupy the property. He was legally adopted by Melinda in 1927, and in that year she executed and delivered to him a deed purporting to convey the entire fee in the property to him. The deed was recorded in 1931. All taxes, since 1927, have been paid by him. Some time prior to 1927, the four children of James and Melinda had left the home of their mother, and after that year only the respondent lived on the property with her. He remained until his marriage in 1937, and Melinda continued her occupancy of it until her death in 1944.

In July, 1944, Meta Evans, one of the children of James and Melinda, was appointed administratrix of the estate of James West. Respondent then brought this suit against her to quiet his title to the property. The administratrix cross-complained, seeking a decree quieting title to a one-quarter interest in the estate of her father, and demanding judgment in the amount of one-fourth of the rental value of the property, less taxes paid. She also asked the court to compel the respondent to pay to the estate the market value of the one-quarter interest assertedly owned by the deceased. Following a trial, the court found that the respondent had obtained title to the property by adverse possession. The appeal is from the judgment entered accordingly.

The administratrix asserts that West's possession was at no time adverse to the heirs of her father as to the one-quarter interest owned by him because in law the possession of one cotenant is the possession of all of them; that the recordation of the deed and the possession of West by living on the premises with his adopted mother are not sufficient to constitute an ouster of the cotenants; and that the payment of taxes is offset by the rent due from him on account of his occupancy of the property.

The respondent justifies the judgment giving him title upon the ground that the recordation, in 1931, of the deed naming him as grantee constituted constructive notice to the heirs of James West that he was claiming adversely to them. He takes the position that the payments of taxes made by him may not be considered as rent, and measures the evidence as fully supporting the findings in his favor.

[1] To establish title by adverse possession, the claimant must establish five elements in connection with his occupancy of the property. Unger v. Mooney, 63 Cal. 586, 49 Am.Rep. 100; see Code Civ.Proc. § 321 et seq. (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. Unger v. Mooney, supra; Thompson v. Pioche, 44 Cal. 508; Wilson v. Nichols, 39 Cal.App.2d 527, 103 P.2d 1007; Huling v. Seccombe, 88 Cal.App. 238, 263 P. 362. (2) Possession must be hostile to the owner's title. Unger v. Mooney, supra; Grimmesey v. Kirtlan, 93 Cal.App. 658, 270 P. 243; Madden v. Hall, 21 Cal.App. 541, 132 P. 291. (3) The holder must claim the property as his own, either under color of title, or claim of right. Unger v. Mooney, supra; Thompson v. Pioche, supra; Lovell v. Frost, 44 Cal. 471. (4) Possession must be continuous and uninterrupted for five years. Akley v. Bassett, 189 Cal. 625, 209 P. 576; Unger v. Mooney, supra; City of San Jose v. Trimble, 41 Cal. 536. (5) The possessor must pay all of the taxes levied and assessed upon the property during the period. Unger v. Mooney, supra; Central Pac. R. Co. v. Shackelford, 63 Cal. 261. Unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession.

[2, 3] Actual possession, said Chief Justice Field, means "a subjection to the will and dominion of the claimant". Cor-

yell v. Cain, 16 Cal. 567, 573. It is established not alone by the assertion of title, but it must be coupled with acts of ownership which proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant is seeking to exercise dominion. Hart v. Cox, 171 Cal. 364, 367, 153 P. 391. But in the present case, there was no change in possession at any time after the date of the interlocutory decree. Melinda continued to live on the property until her death in 1944, and West occupied it with her until his marriage in 1937. To the public generally, and to the heirs of James West, after the date of the interlocutory decree when the cotenants acquired title, there was no indication of any change in possession from Melinda.

[4] The testimony of West conclusively negatives his claim that, at any time prior to 1944, he had actual possession of the property. According to his explanation of the situation, from 1917 until the date of her death in 1944, Melinda West "stayed in her home." During the 20 years following 1917 he lived with her. Upon his marriage in 1937 he "moved off gradually." Referring to that time, he declared: "She didn't want anybody to live with her and she didn't care to live with any of her relatives. She said, 'This is my home and I want to stay right here'." The evidence conclusively establishes that for many years West paid the taxes on the property, but such payment is not an act of ownership equivalent to possession. The payment of taxes is an additional requirement for the acquisition of title by adverse possession. Code Civ.Proc. § 325.

[5] The exclusive occupancy by a cotenant is deemed permissive; it does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the cotenant is hostile to him. Faubel v. McFarland, 144 Cal. 717, 78 P. 261; Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Miller v. Myers, 46 Cal. 535; Nelson v. Sweitzer, 22 Cal.App.2d 382, 71 P.2d 85; Tabler v. Peverill, 4 Cal.App. 671, 88 P. 994. West argues that the recordation of the deed in 1931 constitutes such notice and in support of his possession, he leans heavily upon Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404.

[6] However, the recordation of a deed purporting to convey the entire property in land to a tenant in possession is not, as a matter of law and independent of any other fact, notice to his cotenant of the adverse character of the grantee's possession. In the Johns case, the claimant had lived on the property with his uncle, the owner of it, until the uncle's death. His possession then became exclusive and he recorded a deed, which had not been delivered, but which gave him color of title. It was the continued possession by him after the death of his uncle plus the recordation of the deed which, the court held, constituted notice to the other heirs who became cotenants with him at the time the uncle died. Another decisive factor was that the claimant, at the time of the commencement of his exclusive occupancy of the property, knew nothing of the existence of the other cotenants.

Neither Pease v. Gibson, 37 Cal.App.2d 353, 99 P.2d 353, nor Satariano v. Galletto, 66 Cal.App.2d 813, 153 P.2d 201, aid the respondent. In the first of these cases there was an exclusive occupancy, under color of title, by persons other than the original occupying cotenant, which was sufficient to constitute notice to the cotenants out of possession of an adverse claim to the property. The possession of such persons is not of itself evidence of the claim of the adverse possessor, but it is notice to the cotenants out of possession sufficient to put them upon inquiry and to charge them with the knowledge that would have been received from such inquiry. Winterburn v. Chambers, supra; see, also, Unger v. Mooney, supra; Fair v. Stevenot, 29 Cal. 486. In the Satariano case, recordation was not relied upon; other acts consistent with a claim of ownership were the basis of the decision.

[7] The only act upon which West can rely to give notice of his claim of ownership is the recordation of the deed in 1931, and such recordation alone is not sufficient for that purpose. For these reasons, there is no evidence to support the

findings of the trial court in regard to adverse possession. The evidence is undisputed and it does not show the elements which the law requires to establish such a title.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 365

FERRANTE et al. v. FISH & GAME COMMISSION OF CALIFORNIA.

S. F. 17331–17335, 17356.

Supreme Court of California, in Bank.

Dec. 6, 1946.

1. Fish 🔑10(1)

Fish and Game Commission could require, as a prerequisite to permit to take pilchard sardines for reduction to meal, that plant for processing sardines be housed in building. Fish and Game Code, § 1068.

2. Fish 🔑10(1)

In allocation of pilchard sardines for reduction purposes, Fish and Game Commission may not arbitrarily discriminate among applicants for permits who meet requirements fixed by the Commission. Fish and Game Code, § 1068.

3. Constitutional law 🔑230(1)

The Fish and Game Commission was not guilty of improper discrimination by denying permits to take pilchard sardines, pursuant to rule, to applicants who could not show that their reduction plants were completed at time of applying, while granting permits to applicants who held permits in the previous season, without inquiring whether they had plants capable of operation and without inspection. Fish and Game Code, § 1068, U.S.C.A.Const. Amend. 14.

4. Constitutional law 🔑212

The equal protection clause does not take from the state the power to classify in adoption of police laws, but admits of exercise of a wide scope of discretion in that regard and avoids only what is done without reasonable basis and is therefore purely arbitrary. U.S.C.A.Const. Amend. 14.

5. Constitutional law 🔑211

A classification having some reasonable basis does not offend against equal protection clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. U.S.C.A.Const. Amend. 14.

6. Constitutional law 🔑48

Existence of state of facts that would sustain classification in a law, at time law was enacted, must be assumed if it can reasonably be conceived.

7. Constitutional law 🔑48

One who assails the classification in a law has burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.

8. Mandamus 🔑164(4)

The experience of Fish and Game Commission as set out in its answers in mandamus proceeding to compel issuance of permit must be considered in determining whether classification adopted by the commission has any reasonable basis in fact.

9. Mandamus 🔑168(2)

In absence of any allegation on the subject in mandamus proceeding to compel issuance of permits to take sardines, court could not assume that applicants who had operated in previous seasons did not in fact have completed plants on date of application, so as to render it discriminatory to grant permits to them and deny permits to petitioners.

10. Constitutional law 🔑38

A statute may be invalid as applied to one state of facts and yet valid as applied to another.

11. Constitutional law 🔑74

The Fish and Game Commission must be presumed to have knowledge of conditions which underly and motivate its regulatory actions, and unless it is demonstrated that those actions are not grounded upon any reasonable factual basis, courts should not interfere with exercise of the discretion vested in the Commission by legislature, nor lightly substitute their judgment for that of the Commission.

12. Fish ⟹10(1)

Applicants were not entitled to permit to take pilchard sardines for reduction to meal on ground that they had substantially complied with rule requiring them to have completed plants at time of applying for permits, when they were prevented from full compliance by labor disputes beyond their control. Fish and Game Code, § 1068.

13. Constitutional law ⟹211

If a classification is reasonable in its overall operation it is not to be stricken down because of its application to a particular case that may lie just inside its borders. U.S.C.A. Const.Amend. 14.

CARTER and SCHAUER, JJ., dissenting.

◆

Petitions in mandamus by S. A. Ferrante and others against the Fish and Game Commission of the State of California to compel issuance of permits to take and use sardines for reduction to meal.

Petitions denied.

Wm. B. Hornblower, Fabian D. Brown and Jefferson E. Peyser, all of San Francisco, for petitioners.

Hudson, Martin, Ferrante & Street and Russell Zaches, all of Monterey, as amici curiae, on behalf of petitioners.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

Burnham Enersen, McCutchen, Thomas, Matthew, Griffiths & Greene, Pillsbury, Madison & Sutro, Eugene M. Prince, Eugene D. Bennett and Charles E. Finney, all of San Francisco, Richard H. Peterson, of Los Angeles, Charles J. Janigian, and Charles P. Scully, both of San Francisco, as amici curiae, on behalf of respondent.

DOOLING, Justice pro tem.

The six petitions herein considered present common questions. The several petitioners are seeking by writ of mandate to compel the respondent, Fish and Game Commission of the State of California, to grant to each of them a permit to take and use pilchard sardines during the 1946–1947 season for the purpose of reducing them into meal in plants severally owned and to be operated by the petitioners.

The petitions all contain similar, and in many respects identical, allegations. It appears therefrom that on October 27, 1945, the respondent adopted the following rules affecting applications for such permits:

"(B) For the 1946–47 sardine season only, no reduction permit shall be granted or issued to any applicant who did not hold a permit and operate in the previous season unless such an applicant produces proof satisfactory to the Fish and Game Commission that he has his plant, including all buildings and equipment therein, as described in rule H, fully constructed and fully equipped to receive and process fish at the time of filing his application.

"(G) A permit may be issued to a plant only after it has been inspected by an accredited representative of the Fish and Game Commission and upon certification by said representative that the plant is fully equipped and ready to operate. The penalty for not being ready to operate on the first day of the season shall be a revocation of tonnage on the basis of the number of days such plant fails to operate. The amount revoked for each day shall be equal to the total tonnage granted to the permittee, divided by total number of days in the season in the district in which the plant is located."

It further appears that the commission, in accordance with law, made a finding that 395,000 tons of pilchard sardines for the season 1946–1947 could be taken from the territorial water of California without adversely affecting the interest of the people of the state; and fixed May 15, 1946, as the last day for receiving applications for permits to take and utilize pilchard sardines for reduction to edible meal; that 109 applicants filed applications for such permits prior to the date fixed and that 99 of such applications were granted, 88 of them to applicants who had held permits for the previous season; and that the applications of the several petitioners were denied upon the ground that there was a substantial failure to comply with rule B of the respondent commission, above quoted.

It is alleged in each of the petitions, except that of Western Sardine Company, Inc., that the several petitioners had contracted for the construction of fish reduction plants to be completed before May 15, 1946, but that due to delays caused by strikes over which the petitioners had no control the several plants were not entirely completed on May 15, 1946. The petition of Western Sardine Company, Inc., contains an allegation that its plant on May 15, 1946, was completed and ready for operation. This allegation has been denied and this petitioner has expressly withdrawn that issue from the court. Thus its case stands with the others as one in which its plant was not completed on May 15 of this year.

A factual difference in the allegation of the petition in S.F. No. 17356 should be noted. The petitioners in that case allege that all machinery and equipment were installed and their plant completed for operation on May 15, but that by reason of strikes and conditions beyond petitioners' control certain materials could not be obtained for the covering of a building housing said machinery and equipment and "that said materials were and are not necessary to the operation of said plant and are not required under the rules and regulations promulgated by said respondent."

[1] The allegation (if that is its intent) that the rules did not require a completed building is contradicted by the language of rule B above quoted, "including all buildings." The allegation that the plant could be operated in an uncompleted building we pass with the observation that it is certainly a proper requirement that all fish reduction plants be housed in buildings, and if the rule requiring the plant to be fully equipped to receive and process fish at the time the application is filed is valid, the requirement that the building in which the plant is housed be completed at that time is equally so.

This brings us to the main contentions upon which the petitioners rely. It is alleged in the several petitions that in the case of the 88 applicants who held permits in the previous season their applications were granted "without any inquiry as to whether or not they had plants capable of operating, or even sites on which to erect a plant, and without any inspection of any kind or character whatsoever, and solely upon the basis of the provisions of Rule G."

This alleged difference in treatment and the rules permitting it are attacked as unreasonably discriminatory.

Amici curiae ask us to sustain the difference in treatment accorded the veterans of the industry and those seeking permits for the first time on the ground that under section 1068, Fish and Game Code, the respondent commission has the power, if it determines that it would result in economic waste to issue permits to newcomers to the industry, to deny permits to them altogether and to limit its permits to those who have operated reduction plants in the previous year. This question is not necessarily involved in this proceeding since the respondent has not taken that position, but has actually issued permits to those newcomers to the industry who complied with Rule B. We accordingly expressly refrain from the decision of that question.

[2, 3] Assuming, as we must, that the respondent has determined that it is proper to issue permits to all applicants who have complied with its rules it may be taken as settled that in the allocation of pilchard sardines for reduction purposes the respondent may not arbitrarily discriminate among the applicants for such permits who meet the requirements fixed by respondent (People v. Globe Grain & Milling Co., 211 Cal. 121, 126–128, 294 P. 3), but that does not mean that the commission is without the power to make the classification that is here under attack. Certain obvious differences exist between the applicant who has successfully operated under a permit allowing him to engage in the reduction of sardines in the previous season and the applicant who seeks to engage in that business for the first time. The former had a plant fully equipped and operating in the previous season. He may be supposed to have established business connections, customers, a staff of employees and operatives for his

plant and possibly contract commitments for the coming year. He clearly stands in a different position from the newcomer to the field. The placing of the newcomer in a separate class and requiring him to have his plant ready for operation by May 15 can only be nullified by this court if we can plainly see that there is no "natural, intrinsic, or constitutional distinction which reasonably justifies difference in treatment." Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 645; In re Herrera, 23 Cal.2d 206, 212, 143 P.2d 345; People v. Western Fruit Growers, 22 Cal.2d 494, 506, 507, 140 P.2d 13; Sacramento Municipal Utility Dist. v. Pacific G. & E. Co., 20 Cal.2d 684, 691, 128 P.2d 529; In re Fuller, 15 Cal.2d 425, 437, 102 P.2d 321; In re Weisberg, 215 Cal. 624, 629, 12 P.2d 446.

In Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 429, 56 S.Ct. 513, 516, 80 L.Ed. 772, the Supreme Court of the United States said of a claim of unreasonable discrimination in an earlier statute of this state governing the processing of fish: "It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation."

It is alleged in the answers that the classification attacked is predicated upon the following facts and was made for the following reasons:

The nature of the fish reduction industry demands that operators of reduction plants know well in advance of the season the number of permits to be granted and the quantity of sardines which will be allocated to each permit, because these factors enter into their seasonal contracts for supplies, labor, fish, and the sale of their products of reduction. Experience gained by respondent over a period of years has conclusively shown it that the applications of newcomers often have been attempts to secure permits with plants more imaginary than real and that assurances on the part of bona fide new applicants that they will be able to complete their plants by the opening of the sardine season or shortly thereafter largely result in failures. Such conditions do not prevail in the case of plants which were operated in the previous season. To grant applications of new applicants who have not completed plants is not conducive of a just, efficient and orderly administration of the law in that the uncertainty of the number of permits which ultimately will be issued leaves the successful applicants and the industry as a whole in confusion and doubt.

That respondent deems it inimical to public interest to permit trafficking in such permits by permittees who cannot themselves make use of them and to that end has limited its permits to those who in fact have fully constructed and equipped reduction plants; and it has been for several years past and now is the policy of respondent to regard the permits as running with the plants and not the individual owners or operators, and this policy has been well publicized and is known to those engaged in the industry and to petitioners. Through experience respondent is reasonably certain that plants which were operated in the previous season will make use of the permits which are granted and issued for the following season.

That experience has also shown respondent that the plants which operated in the previous season are required to be dismantled from time to time for the purpose of making repairs, replacements, alterations and for overhauling during the period between fishing seasons, and that time and circumstances do not in every case allow such plants to be reassembled until after the final date set for the filing of applications for permits for the coming season. This condition does not exist in the case of new plants being constructed for the first time.

It further appears that the applications are granted or denied and the allocation of sardines is made well in advance of the season, but permits are not actually issued until shortly before the season starts, at which time under rule G, all permittees alike, newcomers whose plants were completed on May 15 and the veterans of the industry, are penalized if for any reason they are not ready to operate on the first day of the season, by a proportionate reduction in the quantity of fish which they are allowed to process.

The limitations upon the power of courts to strike down classifications made for the purpose of regulation are well settled. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79, 31 S.Ct. 337, 340, 55 L.Ed. 369, Ann.Cas.1912C, 160, the highest court stated them as follows:

[4-7] "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U.S. 36, 41, 27 S.Ct. 243, 51 L.Ed. 357, 359; Louisville & Nashville R. Co. v. Melton, 218 U.S. 36, 30 S.Ct. 676, 54 L.Ed. 921, [47 L.R.A.,N.S., 84]; Ozan Lumber Co. v. Union County Bank, 207 U.S. 251, 256, 28 S.Ct. 89, 52 L.Ed. 195, 197; Munn v. Illinois, 94 U.S. 113, 132, 24 L.Ed. 77, 86; Henderson Bridge Co. v. [City of] Henderson, 173 U.S. 592, 615, 19 S.Ct. 553, 43 L.Ed. 823, 831."

This court recently in People v. Western Fruit Growers, supra, 22 Cal.2d at page 507, 140 P.2d at page 20, said: "When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. In re Fuller, 15 Cal.2d 425, 437, 102 P.2d 321; McCreery v. McColgan, 17 Cal.2d 555, 562, 110 P.2d 1051, 133 A.L.R. 800; In re Livingston, supra, [10 Cal.2d 730, 76 P.2d 1192]; Sequoia Nat. Park Stages Co. v. Sequoia & General Grant Nat. Parks. Co., 210 Cal. 156, 291 P. 208; Martin v. Superior Court, supra, [194 Cal. 93, 227 P. 762]; In re Cardinal, supra [170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850]; County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963; Pacific Gas & Elec. Co. v. Moore, 37 Cal.App.2d 91, 98 P.2d 819."

[8] The experience of the respondent commission as set out in its answers must be looked to and considered in determining whether the classification adopted has any reasonable basis in fact and we cannot say that the rules as interpreted and administered by the commission discriminate arbitrarily against the petitioners unless it is demonstrated to us that they find no supporting basis which might appeal to persons of reasonable mind.

The necessity of the permittees knowing long enough in advance the quantity of fish allocated to each so that they can make their contracts and arrangements for the coming season is obvious. The respondent's practice of treating the permits as running to the plants and not to the operators guarantees that veterans without plants, because they have disposed of them or razed them or they have been otherwise destroyed, will not be granted permits for the coming season. We cannot say that the tolerance given to the veterans of the industry over the newcomers by rule B is not justified by the respondent's experience that old plants must be repaired and reconditioned between seasons. The sardine season ends in the north on February 15 and in the south on March 1. Any repairs and reconditioning of old plants cannot start until the season ends, and repairs and reconditioning might be impossible or impracticable between those dates and May 15, while perfectly feasible before the season starts on August 1. Newcomers to the industry on the other hand can commence construction of their plants at any time, and in ample time to be fully completed by the May 15 deadline.

The petitions contain no allegation that any applicant whose application was actually granted did not in fact have a plant ready for operation, but only that as to the 88 former permittees no investigation to ascertain the facts was made.

[9, 10] We cannot assume in the absence of any allegation on the subject that any of the veteran applicants did not in fact have completed plants on May 15. In the absence of an allegation to that effect we must under the authorities cited, assume a state of facts which will make the regulation in its actual operation constitutional. "A statute may be invalid as applied to one state of facts and yet valid as applied to another." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289, 42 S.Ct. 106, 108, 66 L.Ed. 239. Or as this court stated in Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177, 187: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Citing Dahnke-Walker Milling Co. v. Bondurant, supra.) The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court." Cf. Wholesale Tobacco Dealers Bureau of Southern California v. National, etc., Co., 11 Cal.2d 634, 661, 82 P.2d 3, 118 A.L.R. 486.

The answer to petitioner's claim that under rule B the respondent might grant the application of a veteran who had no existing plant on May 15 is found in these authorities. So far as the pleadings show the supposition is purely hypothetical and under the facts pleaded that situation is not presented to us for determination.

So long as the allocation of fish is fairly made among the applicants who satisfy the rules, newcomers (of which apparently 11 this year qualified) and veterans of the industry being treated with equality in that respect, we can find no basis for holding the regulations capricious, unreasonable or arbitrary.

[11] The Legislature has entrusted the supervision and protection of this valuable resource of the state to the respondent commission, not to the courts. The commission must be presumed to have a knowledge of the conditions which underlie and motivate its regulatory actions and unless it is demonstrated that those actions are not grounded upon any reasonable factual basis the courts should not interfere with the exercise of the discretion vested in it by the Legislature, nor lightly substitute their judgment for that of the commission.

[12, 13] Petitioners argue further that they have substantially complied with rule B, "being prevented from full compliance by causes beyond their control, viz: Labor disputes, and as a consequence it is an exceedingly harsh discrimination to deny them consideration altogether because of their failure to have a 100 per cent compliance with the rule." Similar apparent hardships are inherent in every classification made for the purpose of regulation. Some close cases must always fall just inside and others just outside of the line delimiting the class, wherever drawn, and the regulation will appear to operate with especial harshness upon those which happen to fall just inside. But the line must be drawn somewhere or there can be no classification and the courts have recognized that if the classification is reasonable in its over-all operation it is not to be stricken down because of its application to a particular case that may lie just inside its borders. Chief Justice Hughes said tersely in Continental Baking Co. v. Woodring, 286 U.S. 352, 370, 371, 52 S.Ct. 595, 601, 76 L.Ed. 1155, 81 A.L.R. 1402: "It is obvious that the Legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn."

Justice Holmes in Dominion Hotel v. State of Arizona, 249 U.S. 265, 269, 39 S.Ct. 273, 274, 63 L.Ed. 597, elaborated the same idea: "If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. 'Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.' Louisville & Nashville R. Co. v. Barber Asphalt Co., 197 U.S. 430, 434, 25 S.Ct. 466, 49 L.Ed. 819."

Cf. Zahn v. Board of Public Works, 195 Cal. 497, 512, 234 P. 388, quoting Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716; Martin v. Superior Court, 194 Cal. 93, 105, 227 P. 762; Matter of Application of Miller, 162 Cal. 687, 699, 700, 124 P. 427; Matter of Petition of Burke, 160 Cal. 300, 303, 304, 116 P. 755.

The alternative writs of mandate heretofore issued are discharged and the petitions for peremptory writs denied.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice.

I dissent. The majority opinion in these cases sidesteps the issue of whether or not the rules of the commission are arbitrary and discriminatory by assuming facts and circumstances not justified by the record and then concludes that petitioners are complaining of a situation which in fact does not exist.

The rules of the commission must be taken as they read, and it must be presumed that the commission will and does enforce those rules in accordance with their plain terms. Code Civ.Proc. § 1963, subd. 15. Those rules provide that *a permit will be issued to an applicant holding a permit for the previous season regardless of whether he has a reduction plant, or, if he has one, it is completed or equipped.* In other words, he need show *only one thing* to obtain a permit, that is, that he had a permit and operated in the previous season. He does not need to have operated for the entire prior season nor any substantial part thereof. He obtains a new permit without qualification, and, according to the plain terms of rule (G), the only penalty he suffers if his plant is not ready to operate at the opening of the season in August, is reduction in his allocation of sardines computed upon the total number of days in the season and the days he is not ready to operate. In the case of *a new applicant* (one who did not hold a permit in the previous season) he must have his plant fully constructed and equipped to receive and process fish on May 15, 2½ months before the season opens. If he does not so qualify he is *refused a permit* rather than merely suffering the penalty imposed on the old applicant of a per diem reduction in his share of the sardines. Thus we have two instances in which the burden imposed upon the new applicant is vastly more onerous than that imposed on the old applicant: (1) The new applicant must have his plant ready 2½ months before the season opens while the old applicant need not have his plant ready until the opening of the season. (2) The new applicant gets no permit—is totally barred from operation during the season if he fails to comply. The old applicant merely suffers a per diem reduction in his share of the sardines.

Yet in the teeth of the positive requirements of the rule, statements to the contrary are made in the majority opinion. *These statements go entirely outside the record.* It is stated in said opinion that: "Certain obvious differences exist between the applicant who has *successfully* operated under a permit allowing him to engage in the reduction of sardines in the previous season and the applicant who seeks to engage in that business for the first time." [Emphasis added.] There is no requirement in the rules that the old applicant must have *successfully* operated under a permit during the previous season. His permit may have been revoked during the season and he may have operated during only part of it and then unsuccessfully. *He is still entitled to a permit by reason of his having merely held a permit and operated "in" the prior season.* The statement is made that: "Experience gained by respondent [commission] over a period of years has conclusively shown it that the applications of newcomers often have been attempts to secure permits with plants more imaginary than real and that assurances on the part of bona fide new applicants that they will be able to complete their plants by the opening of the sardine season or shortly thereafter largely result in failures. Such conditions do not prevail in the case of plants which were operated in the previous season." How can the last statement be true when it is clear that no effort is made on May 15 to find whether the old applicants have plants? They are not required to have plants to obtain a permit. They may have sold the plants they had the previous season or they may be beyond repair. Yet having had permits for the prior season they will obtain permits for the instant season subject only to the per diem loss of their allocation of sardines if they are not ready on the first day of the season. The same criticism is applicable to the statement that "respondent deems it inimical to public interest to permit trafficking in such permits by permittees who cannot themselves make use of them and to that end *has limited its permits to those who in fact have fully constructed and equipped reduction plants;* * * *" [Emphasis added.] In applying its rules the commission has no assurance that the old applicants have completed reduction plants and even when they do not, they still receive a permit. It is also said that: "The respondent's practice of treating the permit as running to the plants and not to the operators guarantees that veterans [not war veterans] without plants, because they have disposed of them or razed them or they have been otherwise destroyed, will not be granted permits for the coming season." and "We cannot assume in the absence of any allegation on the subject that any of the veteran [not war veteran] applicants did not in fact have completed plants on May 15. In the absence of an allegation to that effect we must, under the authorities cited, assume a state of facts which will make the regulation in its actual operation constitutional." And "The answer to petitioner's claim that under Rule B the respondent might grant the application of a veteran [not war veteran] who had no existing plant on May 15 is found in these authorities. So far as the pleadings show the supposition is purely hypothetical and under the facts pleaded that situation is not presented to us for determination." The rules do not permit of a denial of a permit to an old applicant even though he has no plant. It is not a question of whether we can assume that old applicants may not have plants on May 15. It is not hypothetical to assume that permits will be granted to old applicants regardless of whether they have a plant. Under the rules the sole requirement is a permit for the prior year. Hence it may not be supposed that an examination will be made to determine whether they have a plant on the application day, May 15. Moreover it is specifically alleged by petitioners (in speaking of old applicants) that their applications are granted "without any inquiry as to whether or not they had plants capable of operating, or even sites on which to erect a plant, and without any inspection of any kind or character whatsoever, and solely upon the basis of the provisions of Rule G."

It must be plain therefore that the treatment of the old and new applicants is wholly different in the two respects above mentioned. To justify that discrimination the majority advances reasons (other than those above discussed which assume matters contrary to the record) as proper bases for classification: (1) That the applicant must know in advance of the opening of the season how many persons will receive permits thus enabling him to ascertain his quota and make his season's business commitments accordingly. That is nothing more than an argument in favor of requiring all plants to which permits are issued to be ready for operation some time before the season opens in order that there shall be some certainty in the number of plants that will operate and the bearing of that factor on the amount of the respective allocations of sardines. It deals with the matter not here in issue. Assuming that such a regulation is proper it applies to *all* applicants alike, whether new or old. To make real the advantage of before season certainty the old and new applicants should be treated similarly, otherwise the rule fails in its purpose. (2) It is asserted that the old applicants must have time to rehabilitate their plants after the end of the prior season and that they would not have time to do so if they are required to have a completed plant on May 15; that such a condition does not prevail as to new applicants; and that hence a rational basis for discrimination exists. There may be some merit in that proposition insofar as it does not require the old applicant to have his plant ready *as far in advance as the new applicant.* Even that is doubtful. *But it furnishes no justification whatsoever for the increased penalty imposed on the new applicant. He gets no permit at all if his plant is not completed by May 15 whereas the old applicant merely loses a portion of his allocation* if his plant is not ready for operation by August 1.

It is clear that the factor that one applicant has been in business before is not a justifiable basis for imposing upon him less onerous regulations than those saddled upon a beginner. There is no rational or intrinsic difference between them which justifies the classification. In In re Wacholder, 1 Cal.App.2d 254, 36 P.2d 705, the ordinance required that to obtain a license to operate a florist business a bond must be given conditioned upon the applicant remaining in the business 180 days unless he had previously been in the business for 365 days. In denouncing the ordinance as discriminatory the court said: "Here is a plain discrimination between the persons engaged in a like business made dependent upon the time in which they have been so engaged. * * * Again, the section referred to is violative of the Fourteenth Amendment to the Constitution of the United States, in that it imposes upon citizens who have not been in business in the city of Sacramento for 365 days a burden not placed upon those who are already engaged in the business and have been so engaged for the period of 180 days. * * * Nor has the city council the power to impose a penalty upon one person transacting a like business with another person simply because person No. 1 may not have been in business for quite so long a period as person No. 2. Such ordinances are neither police nor revenue measures, but are simply exclusive and discriminatory, and under the constitutional provisions which we have referred to cannot be sustained." At page 258–260 of 1 Cal.App.2d, at page 707 of 36 P.2d. State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101, involved a statute which prevented the issuance of licenses to take salmon to persons who had not previously had licenses. It was held at page 1105 of 59 P.2d: "A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a mere fortuitous characteristic or quality of persons, or upon personal designation. In short, the classification cannot be an arbitrary selection. These principles have been so frequently stated and so thoroughly recognized that it is unnecessary to cite any authority in their support.

"The classification made by section 4 of the act in question can have no natural, reasonable, or just relation to the subject matter of the act. If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to all others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state. The selection rests upon mere accident or circumstance, and not upon conditions effecting a natural line of cleavage. We are of the opinion, and hold, that section 4 of the act, exclusive of the proviso, is unconstitutional and void."

Rule B is clearly not a conservation measure, as the commission had previously fixed the total quantity of pilchard sardines which could be taken during the 1946-1947 season at 395,000 tons, and it is obvious that the number of permits granted would not affect the total take permitted.

In my opinion there is no reasonable or rational basis for the classification provided for in rule B and that such classification is so arbitrary, discriminatory and unfair as to render said rule void.

I would issue the peremptory writs of mandate prayed for by petitioners.

SCHAUER, J., concurred.

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29 Cal.2d 380

DEL MAR CANNING CO. v. PAYNE et al.

S. F. 17373.

Supreme Court of California, in Bank.

Dec. 6, 1946.

Rehearing Denied Dec. 30, 1946.

1. Constitutional law 🔑230(3)

A classification which draws the line in favor of existing businesses as against those later entering the field will be upheld under equal protection clause if any reasonable and substantial basis can be found to justify it. U.S.C.A.Const. Amend. 14.

2. Constitutional law 🔑211

A classification is unconstitutional under equal protection clause if it is purely arbitrary and capricious, resting on no reasonable or substantial difference between classes when considered in relation to object of the regulation. U.S.C.A.Const. Amend. 14.

3. Constitutional law 🔑230(1)

Where Fish and Game Commission rule, that permits to take sardines for reduction to meal should be issued only to complete reduction plants, was enforced only against plants not operated in previous seasons, there was an unconstitutional discrimination against newcomers. U.S.C.A. Const. Amend. 14.

4. Constitutional law 🔑43(1)

One who agreed, in application for permit to take sardines, to be bound by Fish and Game Commission's rules was not estopped thereby or by conduct of others with respect to the rule from attacking the rule as unconstitutional.

5. Constitutional law 🔑43(1)

The Fish and Game Commission had no power to place upon those engaged in industry, the burden of objecting to a rule at time of its formulation by the Commission, under pain of thereafter being estopped to attack its validity.

◆

Mandamus proceeding by Del Mar Canning Company against Lee F. Payne and others, comprising the Fish and Game Commission of the State of California, to compel issuance of permit to take and use sardines for reduction to meal.

Writ granted.

John Milton Thompson, of Monterey, and Orrick, Dahlquist, Neff, Brown & Herrington and Willard Johnston, all of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondents.

DOOLING, Justice pro tem.

Petitioner herein seeks a writ of mandate to compel the issuance of a permit to take and utilize pilchard sardines for reduction to meal in its Plant No. 2 for the 1946-47 season. Petitioner owns a building in Monterey in which are located a fish canning plant and two fish reduction plants designated for convenience "Plant No. 1" and "Plant No. 2" Plant No. 2 was constructed in 1945 but no permit was issued by respondents for its operation in the 1945-46 sardine season because it was not completed by May 15, 1945.

For the 1946-47 season the respondent commission adopted a Rule H reading:

"(H) Permits shall be granted or issued only to complete reduction plants. A complete reduction plant shall be a building or buildings which must be independent of any other plant, except the cannery of which the plant is a part and all machinery and equipment including hopper, hoist, and unloading facilities, scales, fish storage bins, presses, dryers, disintegrators, wet or dry, meal sacking equipment, meal storage warehouse, oil settling tanks, oil centrifuges, oil loading equipment, and steam plant, and all other equipment necessary for the unloading, weighing, and processing of sardines and for the storage of the products obtained therefrom. The joint use of any of the equipment or machinery with any other reduction plant shall not be permitted."

By letter dated November 27, 1945, the respondent commission supplemented and construed Rule H as follows: "The second sentence of Rule H is intended as a guide to those who are constructing new plants and intend to apply in 1946 for a reduction permit for a plant which was not authorized in the 1945-46 season to reduce sardines. Plants which operated in the 1945-46 season will not be affected by the second sentence of Rule H except as to operating equipment mentioned therein."

The effect of Rule H as so construed was to require every fish reduction plant which had not operated under a permit granted in the 1945-46 season to be housed in a separate building while allowing two or more such plants to continue to operate in a single building if they had operated under permits in the 1945-46 season.

Pursuant to Rule H as so construed, petitioner was denied a permit for its Plant No. 2, the sole ground of denial being that it was not operated in the previous season and was not located in a building independent of any other plant. Admittedly separate permits for more than one plant housed in one building were granted for the 1946-47 season to other operators who had held permits for the same plants in the previous year. The discrimination so practiced is attacked by the petitioner as a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

[1, 2] A classification which draws the line in favor of existing businesses as against those later entering the field will be upheld if any reasonable and substantial basis can be found to justify the classification. People v. Western Fruit Growers, 22 Cal.2d 494, 506, 140 P.2d 13, and cases therein cited. On the other hand, such a classification is unconstitutional if it is purely arbitrary and capricious, resting on no reasonable or substantial difference between the classes when considered in relation to the object of the regulation. Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675; In re Wacholder, 1 Cal.App.2d 254, 36 P.2d 705; In re Fassett, 21 Cal.App.2d 557, 69 P.2d 865; Soares v. City of Santa Maria, 38 Cal.App.2d 215, 100 P.2d 1108; Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 P. 153, 71 Am.St.Rep. 75.

[3] In Ferrante v. Fish & Game Commission, Cal.Sup., 175 P.2d 222, a majority of the court found a reasonable and substantial basis for the classification therein attacked, a controlling factor being that those engaged in the reduction of sardines to fish meal in the previous season might reasonably require more time to repair and recondition their plants than the May 15 deadline fixed for newcomers who were applying for permits for the first time. We can find no such reasonable and substantial basis for the classification made by its Rule H as interpreted by the respondent commission.

The only justification for the classification here in question advanced by respondents is found in the following allegations of their answer: "In this respect, respondents allege that experience gained by them and their predecessors in office has shown conclusively that large plants have been able to obtain a larger share of the total amount of sardines allowed for reduction each season than normally would be allotted to them through the simple expedient of dividing reduction machinery and equipment into units within their respective plants and thereby obtain so-called 'multiple permits' within a given plant. Due to many factors, such for example as concealed wiring and piping, it is impractical, if not impossible, for respondents to determine if such units are separate in fact. It is also impractical, if not impossible, for respondents to determine if the facilities of such units are not intermingled and used jointly by the owner during the ensuing sardine season."

It is clear that these reasons apply with equal force to all plants with several units housed in a single building. It is just as difficult to detect concealed wiring and piping and thereby determine whether the units are in fact separate in a plant which operated such units under permits granted in the previous year as it is in the case of an applicant who this year is applying for separate permits for more than one unit for the first time. It is just as difficult to determine whether the facilities of such units are intermingled and used jointly by the owner in an old plant as in a new one. The experience upon which respondents rely must have been gained in their attempt to police the very plants which are now given a preference. We can find no justification for placing a more onerous burden upon newcomers to the field because of difficulties of regulation which experience has shown exist in the policing of the plants of the same operators who, in the face of such difficulties, are now placed in a preferred class.

[4, 5] Respondents further urge that petitioner is estopped to attack the rule because he did not object to its formulation, because in his application for a permit he agreed to abide and be bound by the rules, and because others but for the rule might have placed themselves in a position to obtain similar permits for multiple units. What others may have done is no concern of the petitioner. It was equally open to all to question the constitutionality of the rule if they saw fit to do so. Petitioner's agreement to abide by the rules in his application may be assumed to have been forced on him by the respondents as a condition required of all applicants for permits and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission. No authority is cited to the point that the failure to object to the promulgation of an unconstitutional rule raises an estoppel to attack it afterwards and we are satisfied that the commission has no legal power to place the burden of objecting to a rule at the time of its formulation upon those engaged in the industry under pain of thereafter being estopped to attack its validity.

Let a peremptory writ of mandate issue as prayed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (concurring).

In my opinion the writ should issue, but I desire to point out that the unconstitutional discrimination in this case is the same in substance and legal effect as that present by the rule involved in Ferrante v. Fish & Game Commission, Cal.Sup., 175 P.2d 222. In both cases arbitrary and unreasonable burdens are placed upon newcomers in the pilchard sardine industry which are not imposed upon those previously established in the business. There is no reasonable basis for the classification in either case and I reiterate the discussion in my dissent in the Ferrante case.

SCHAUER, J., concurred.

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77 Cal.App.2d 395

BARBER v. FOXWORTHY et al.

Civ. 15462.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1946.

Automobiles ⚷197(7)

Where window cleaner, when he was driving his automobile containing cleaning equipment and used in his work from his home to his employer's office to look for orders, picked up a passenger and went a little out of his way to deliver passenger and was involved in collision with another automobile at a point not along the route he would otherwise have traveled, window cleaner was not at time of accident an "employee" of his employer and was not acting within "course of", or "scope" of, his "employment" so as to make employer liable for cleaner's negligence.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by William L. Barber against Bertrum Foxworthy and another for personal injuries sustained in automobile collision. From a judgment for plaintiff against named defendant, exonerating defendant American Building Maintenance Company from liability, plaintiff and named defendant appeal.

Affirmed.

Fred M. Riedman, Clock, Waestman & Clock and E. W. Sheridan, all of Long Beach, for appellant Barber.

Shibley, Wanzer and Litwin, of Long Beach, for appellant Foxworthy.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

DORAN, Justice.

In a personal injury action, plaintiff recovered a judgment for $4200.00 against defendant Foxworthy, it being also decreed that plaintiff take nothing fram defendant American Building Maintenance Co., a partnership (sued as One Company, a corporation) by whom said defendant Foxworthy was employed.

This appeal is prosecuted by plaintiff Barber and defendant Foxworthy from that part of said judgment which exonerated the partnership from liability. It is here claimed that the evidence conclusively establishes the fact that, at the time of the accident, appellant Foxworthy was acting within the course and scope of his employment by respondent partnership, hence the court's finding to the contrary is erroneous as a matter of law.

The record discloses that at 7:30 p. m. of February 4, 1943, appellant Barber was operating a Good Humor ice cream truck easterly along the south side of 11th Street in the City of Long Beach; that he was hailed by a customer in the middle of the block between Hoffman and Walnut streets and brought his truck to a stop approximately eighteen inches from the southerly curb of 11th Street and parallel thereto. The truck was painted white with a blue trim, the headlights conforming to the dim-out regulations then in effect, and the rear box of the truck was lighted on each side and on the rear with side lights which shone downward upon advertising signs. Appellant Barber alighted from the truck and was standing at the rear thereof waiting for his customer when appellant Foxworthy, driving his automobile in a westerly direction on the southerly side of 11th Street, collided with the left front end of the ice cream truck. The force of the collision propelled the truck backward striking appellant Barber, causing the injuries alleged. Appellant Foxworthy, the owner of the Plymouth car involved in the collision, was employed by respondent American Building Maintenance Company, a janitorial and window cleaning service, with an office in Long Beach. At the time in question, there was a ladder on the top of Foxworthy's automobile attached to a mechanical carriage anchored thereto by rubber suction cups, and on the inside of the car was certain window cleaning equipment, all of which was owned by the respondent partnership and had been consigned to Foxworthy for use by said Foxworthy.

The facts as to Foxworthy's connection with the maintenance company are without dispute. Foxworthy testified as follows:

"I was living out on Gardena Street, just off of Anaheim.

"Q. Is that where you kept your truck and your equipment? A. Yes, I just left it right on the car.

"Q. And just before the accident—you say you had been to South Gate? "A. Over in South Gate City Hall washing windows.

"Q. Did you finish that job? A. That is why I worked late.

"The Court: Where were you bound for? A. As I was coming home?

"The Court: You were going home? A. Yes, I was coming home.

"The Court: What time did you finish work? A. Oh, I would say approximately about 7:00 o'clock I finished up, approximately.

"Q. By Mr. Riedman: Were you alone when you finished work, or was soneone with you? A. Nobody was with me, I was alone.

"Q. You were alone? A. Yes.

"Q. This accident happened about what time? "A. Oh, I would say about 7:45 or 8:00 o'clock.

"Q. Was that your custom when you finished a job to drive directly home? A. That's right.

"Q. And then the next morning you would start directly from home to your next job? A. No.

"Q. What did you do then? A. Go to my office first and see if there was any special orders there."

Foxworthy testified further,

"I picked up a sailor on Pacific, and the only reason I went to 11th was he says, 'I am going to get off on the corner of 11th and Walnut.' I said, 'I will drive you up there and let you off and I will go on around the block and go on home.' He said, 'That's fine.' I left him off on the corner and turned the corner * * *", and on cross-examination,

"Q. From the time you left the City Hall in South Gate until the accident happened did you have anything to drink? "A. I had one bottle of beer at The Little Colingo on Atlantic. * * *

"* * * The sailor said he wanted to get off on 11th Street. I said, 'All right, I will take you up there and go around the block and go right on home.'"

Thus the record reveals that Foxworthy picked up a passenger and it was incidental to the delivery of the passenger that the accident occurred; and at a point not along the route Foxworthy otherwise would have traveled.

The finding of the trial court, "That the defendant, Bertrum Foxworthy, was not at the time of said accident an employee of the American Building Maintenance Co., partnership, and was not at the time of said accident, acting within the course of, or scope of, his employment.", is supported by the evidence.

Appellant's contention to the contrary lacks support in the record. For which reason, the judgment is affirmed.

WHITE, J., concurs.

YORK, P. J., dissents.

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77 Cal.App.2d 339

KEITHLY et al. v. LACEY.

Civ. 15420.

District Court of Appeal, Second District,
Division 2, California.
Dec. 19, 1946.

1. Venue 🔑16½

Where real and personal actions are joined in same complaint, case must be tried in county in which defendant resides if he so demands, but plaintiffs cannot, by uniting in their complaint matters that are subject of personal action, with those that are subject of local action, compel defendant to have both matters tried in county other than that in which he resides. Code Civ. Proc. § 392, subd. 1.

2. Venue 🔑72

On defendant's motion for change of venue to county of his residence, court will examine complaint to ascertain whether action is local or transitory and to determine character of the judgment that might be entered upon default thereon. Code Civ. Proc. § 392. subd. 1.

3. Venue 🔑16½

Where complaint alleged that defendant held in trust for plaintiffs an undivided one-half interest in realty in Los Angeles county and two other counties and personalty consisting of ten first mortgage bonds having par value of $1,000 each, a recorded livestock and cattle brand, and $8,000 in cash, action was both local and transitory, and hence defendant was entitled to have case tried in county of his residence. Code Civ. Proc. § 392, subd. 1.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Gladys L. Keithly and another against Mark B. Lacey to establish a trust in real and personal property and to direct defendant to execute such conveyances as should be necessary to convey to plaintiffs their interest in such property. From an order denying defendant's motion for change of venue from Los Angeles County to Inyo County, where defendant resided, defendant appeals.

Reversed with directions.

O'Melveny & Myers and Pierce Works, all of Los Angeles, and George Francis, of Independence, for appellant.

Macdonald, Wallace, Cashin & Arrington, of Los Angeles, for respondents.

WILSON, Justice.

Defendant has appealed from an order denying his motion for a change of venue from Los Angeles County to Inyo County where he resides.

Respondents allege in their complaint that appellant holds in trust for them an undivided one-half interest in real property in Los Angeles, Tulare and Inyo Counties, personal property consisting of ten first mortgage bonds having a par value of $1,000 each, a recorded livestock and cattle brand, and $8,000 in cash. They pray for a decree establishing the trust and directing defendant to execute such conveyances as shall be necessary to convey to plaintiffs their respective interests in the property.

Respondents' position is that since the action involves real property it should be tried in Los Angeles County where some of the real property is located (Code Civ. Proc., sec. 392, subd. 1), and appellant contends that since the action is partly local and partly transitory he is entitled to a trial in the county in which he resides.

[1, 2] If the action involved real property alone the contention of respondents would be sustained, but they seek to recover an interest in both real and personal property. Where real and personal actions are joined in the same complaint the case must be tried in the county in which the defendant resides if he so demands (Smith v. Smith, 88 Cal. 572, 576, 26 P. 356; Stesel v. Santa Ana River Water Co., 35 Cal.App.2d 117, 125, 94 P.2d 1052; Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 523, 274 P. 977; Warner v. Warner, 100 Cal. 11, 16, 34 P. 523; Sheeley v. Jones, 192 Cal. 256, 258, 219 P. 744; Hays v. Cowles, 60 Cal.App. 2d 514, 516, 141 P.2d 26), but plaintiffs cannot, by uniting in their complaint matters that are the subject of a personal action with those that are the subject of a local action, compel defendant to have both matters tried in a county other than that in which he resides. Smith v. Smith, supra. The court will examine the complaint in order to ascertain whether the action is local or transitory and to determine the character of the judgment that might be entered upon a default thereon. Eckstrand v. Wilshusen, 217 Cal. 380, 381, 18 P.2d 931; McFarland v. Martin, 144 Cal. 771, 774, 78 P. 239.

[3] This action is twofold and a judgment by default could impress a trust on (1) real property located in Los Angeles County and two other counties, and (2) personal property. Since the action is both local and transitory appellant is entitled to have the case tried in the county of his residence. The transitory portion of the action is not merely incidental to the real cause of action and relief sought, as in Donohoe v. Rogers, 168 Cal. 700, 144 P. 958, and other cases relied on by respondents, but it is one of the chief component parts of the case. Appellant is therefore entitled to have the case tried in the county in which he resides.

The order denying the motion for a change of venue is reversed with directions to grant the motion.

MOORE, P. J., and McCOMB, J., concur.

77 Cal.App.2d 299

PEOPLE v. BARNETT.

Cr. 4040.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1946.

1. Criminal law ⚷1159(2, 4, 6)

The function of appellate courts is not to retry a criminal case or determine the credibility of witnesses, and it may not disturb the findings of the triers of fact unless it is made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in trial court.

2. Criminal law ⚷1160

Where the evidence which militates against defendant considered by itself and without regard to conflicting evidence is sufficient to support conviction, the question of sufficiency of the evidence ceases to be a question of law reviewable on appeal and becomes one of fact upon which the decision of jury and trial court is conclusive.

3. Criminal law ⚷544

Permitting prosecution to read into evidence, over defendant's objection, testimony given at preliminary examination by naval lieutenant, was not error, where witness was stationed in Hawaii, was subjected to exhaustive cross-examination and recross-examination by defense counsel at preliminary hearing, and no showing was made that such testimony would have been different had witness been present at trial.

4. Criminal law ⚷563, 568

Intent may be proved by circumstantial evidence, but circumstantial evidence relied on to prove commission of a crime or any part of the corpus delicti must be consistent only with the theory of guilt and inconsistent with any other hypothesis tending toward innocence.

5. Homicide ⚷34

A killing constitutes "involuntary manslaughter" where death occurs, without malice or any intent to kill, but in the commission of an unlawful act not amounting to a felony, and hence in prosecution for such offense intent of defendant is immaterial. Pen.Code, § 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Manslaughter".

6. Automobiles ⚷344

Motorist who, driving truck into intersection against red traffic signal in violation of provisions of vehicle code, designed to prevent injury to the person, making disobedience of traffic signals a misdemeanor, collided with automobile proceeding across intersection on a green light causing death of occupants of automobile, was guilty of "involuntary manslaughter", regardless of malice or any intent to kill. Pen.Code, § 192, subd. 2; Vehicle Code, §§ 450, 476.

7. Criminal law ⚷1159(6)

Appellate court may not reverse a conviction based on circumstantial evidence if the circumstances established reasonably justify the verdict, even though appellate court is of the opinion that such circumstances might be reasonably reconciled with innocence of defendant.

8. Homicide ⚷101

Contributory negligence of decedent was not available as a defense to prosecution for involuntary manslaughter, since it is never a defense or excuse for crime. Pen.Code, § 192.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Harold James Barnett was convicted on each of two counts of information charging involuntary manslaughter, and he appeals.

Judgments affirmed.

Sullivan, Lane & Clarke, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Laughlin E. Waters, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information, the defendant was charged in two counts with involuntary manslaughter, alleged to have been committed in violation of subdivision 2 of section 192 of the Penal Code. Following trial before the court sitting without a jury he was adjudged guilty on both counts. From such judgments of conviction he prosecutes this appeal.

Lakewood Boulevard in Los Angeles County intersects with Imperial Highway at an acute angle. At the point of intersection, Lakewood Boulevard, which carries the north-south traffic, is a four-lane highway, 75 feet in width, with a raised separation barrier in the center some five feet wide. Imperial Highway, at this point, is a four-lane east-west arterial, forty feet in width.

Traffic at the intersection is controlled by a series of signals of the red, green, amber light type. Two signals, one conventionally mounted on a post, and the other attached thereto but in such a manner as to overhang the highway, are located on the southwest corner and control the southbound traffic on Lakewood Boulevard. A similar arrangement of signals controlling the northbound traffic on Lakewood Boulevard, is located on the northeast corner of the intersection. Eastbound traffic on Imperial Highway is controlled by one signal of the same type conventionally mounted on a post on the southeast corner and the signal controlling the westbound traffic of Imperial Highway is located on the northwest corner of the intersection. On the last named corner of the intersection is an orange grove which interferes with observation and renders the corner "blind" to southbound drivers as to traffic approaching from the west on Imperial Highway.

At 1:30 o'clock on the afternoon of May 5, 1945, described by witnesses as a day "clear and dry," defendant, employed by California Institute of Technology, driving a Navy truck, was traveling in a southern direction on Lakewood Boulevard. The victims were traveling in a Chevrolet sedan automobile on Imperial Highway in an easterly direction. In the intersection a collision ensued, as a result of which two men riding in the sedan were fatally injured.

The principal witness for the prosecution was Stanley B. LaRue, a Lieutenant in the United States Navy, who testified that defendant was driving his truck in the righthand lane going south on Lakewood Boulevard. The witness was driving in the lefthand lane going south, approximately 50 feet behind defendant's truck, which he had been following in the same relative position for several blocks. Both vehicles were traveling between 35 and 40 miles per hour.

Lt. LaRue testified that when he was some 200 yards distant from the intersection he observed the traffic signal controlling southbound traffic flash "amber"; that when he was 100 yards away the light turned "red." That he slowed his vehicle down to comply with the signal by stopping, but that defendant's truck, without slackening its speed, proceeded into the intersection. That the signal light was "red" when the collision occurred, and that it was not until some fifteen seconds had elapsed after the impact that the light changed to "green."

Mrs. Mary I. LaRue, riding with her husband, corroborated his testimony as to the speed of the vehicles, the relative position of their vehicle and that of the defendant, and the fact that the signal was "red" for southbound traffic at the time defendant's truck entered the intersection.

Some further corroboration concerning the color of the signal light at the time the truck entered the intersection, may be inferentially drawn from the testimony of Mrs. Pauline Beagley, wife of one of the victims and who was riding with him. She testified that, at the time the automobile in which she was riding entered the intersection, the traffic signal controlling eastbound traffic on Imperial Highway was "green." And, since the signals are synchronized, it could be inferred that the signal for southbound traffic on Lakewood Boulevard was "red." Two highway patrolmen testified they observed that the signals were functioning properly when they investigated the accident shortly after it occurred.

The fatal collision occurred in the southwest quarter of the intersection, following which the defendant's truck continued on to a point on Lakewood Boulevard 80 feet beyond the intersection, where it overturned, while the Chevrolet sedan came to rest on the east curb of Lakewood Boulevard, somewhat south of the intersection.

[1, 2] Defendant's testimony, and that of his assistant who was riding with him, is squarely contradictory to that of the foregoing eye witnesses. However, under familiar and long recognized rules of law, it is established that the function of an appellate tribunal is not to retry the case or to determine the credibility of witnesses. As was said by this court in People v. Ogden, 41 Cal.App.2d 447, 455, 107 P.2d 50, 54: "An appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Gidney, 10 Cal.2d 138, 143, 144, 73 P.2d 1186. No such showing is made in the instant case. True, there is an irreconcilable conflict between the testimony of the prosecutrix and that given by the defendant. However our appellate jurisdiction extends only to questions of law, and where the evidence which militates against the defendant, considered by itself and without regard to conflicting evidence is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

[3] Appellant contends that the trial court abused its discretion in permitting the prosecution to read into evidence, over appellant's objection, the testimony of the aforesaid witness Lt. Stanley B. LaRue given at the preliminary examination, on the ground that such witness could not with due diligence be found within the state of California. This contention is without merit. At the trial it was established without contradiction that the witness was a Lieutenant in the United States Navy and was stationed in Hawaii; that he had been out of the state of California for four months preceding the trial, during which period he regularly corresponded with his wife by mail from Hawaii. We are therefore convinced that it was "satisfactorily shown" not only that the witness could not be found within the state, but that he was actually residing without the state. An examination by us of the record also shows that at the preliminary examination this witness was subjected to an exhaustive cross-examination by defendant's counsel and was also further interrogated on re-cross-examination. Furthermore, as to this witness, there was no showing that the testimony in question would have been any different if the absent witness had been present at the trial, nor was there any showing that evidence of an impeaching character had materialized since the preliminary examination. People v. Bernstein, 70 Cal.App.2d 462, 469, 161 P.2d 381; People v. Collup, 27 Cal.2d 829, 839, 167 P.2d 714. Under the facts here present it cannot be held that any constitutional rights of appellant were invaded or that the trial court abused its discretion by admitting in evidence the former testimony of the absent witness.

[4] Appellant's main ground of appeal is thus stated by him:

"* * * in crimes of the nature of the one involved in the case at bar, intent is a positively and necessarily material element to be proven before The People are entitled to a conviction. Section 20, Penal Code; People v. Pociask, 14 Cal.2d 679, at page 683, 96 P.2d 788. However, we are fully aware of the fact that intent, like any other element of the corpus delicti, may be proven by circumstantial evidence; but we hasten to say that, when circumstantial evidence is used to prove the commission of a crime or any part of the corpus delicti, then the rule enunciated by the Supreme Court in People v. Lamson, 1 Cal.2d 648, at page 661, 36 P.2d 361, immediately comes into play.

"The point we make is that the intention of a malignant and abandoned heart was not proven by The People in this action in such a manner that the proof was consistent only with the idea of guilt and inconsistent with any other hypothesis tending toward innocence."

Concerning the case of People v. Lamson relied upon by appellant, the Supreme

Court in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, had this to say:

"As to the Lamson case, it may be said that nothing was decided in that case except that the judgment be reversed. On no other question involved on the appeal was there a concurrence of a majority of the members of the court."

In support of his claim that under the provisions of section 20 of the Penal Code reading, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence," the intent of the defendant becomes material and that proof of such intent in the instant case, resting on circumstantial evidence alone, such evidence not being consistent only with the hypothesis of guilt and inconsistent with any other rational hypothesis, the guilt of the defendant was not established, appellant relies on the case of People v. Pociask, supra, 14 Cal.2d at page 683, 96 P.2d 788. However, the evidence in the case at bar, insofar as the "circumstances connected with the offense" (Penal Code, sec. 21) are concerned, is direct and not circumstantial. In the case of People v. Pociask, supra, cited by appellant, the court was concerned with a prosecution under section 500 of the Vehicle Code, as it then existed (Stats.1935, p. 2141), for negligent homicide. In that case the question for decision was the meaning of the words "driving in a negligent manner" as used in the statute. The case has no application to a prosecution such as the one before us, for involuntary manslaughter.

[5] In a prosecution for involuntary manslaughter the intent of the defendant is not material because the offense charged is the taking of life in certain unlawful ways without any intention of doing so. As was said in People v. Miller, 114 Cal. App. 293, 300, 301, 299 P. 742, 745, "* * * the killing is involuntary manslaughter 'where death occurred, without malice or any intent to kill, but in the commission of an unlawful act not amounting to a felony.'" For additional authority that in a case of involuntary manslaughter the question of intent is immaterial, see People v. Schmah, 62 Cal.App. 192, 196, 216 P. 624.

[6, 7] Section 476 of the Vehicle Code prescribes rules governing the various types of traffic signals. It further directs that no person shall disobey such signal regulatory devices except in certain instances not here material. Section 450 of the same code makes any such violation a misdemeanor. These provisions of the Vehicle Code being designed to prevent injury to the person, and there being substantial evidence to support the finding of the trial court that the defendant was guilty of such violation, as a result of which death ensued, it must be held that he committed an unlawful act within the meaning of Penal Code, section 192, and that he is, therefore, guilty of involuntary manslaughter. People v. Mitchell, 27 Cal.2d 678, 683, 166 P.2d 10. Contrary to appellant's contention, the testimony establishing that he drove through the intersection against a "red" traffic signal and collided with the eastbound vehicle containing the deceased victims, is direct and not circumstantial, as evidenced by the testimony of the witness Lt. LaRue and his wife hereinbefore narrated. And even though the evidence was circumstantial nevertheless, if "the circumstances established reasonably justified the conclusion of the jury as expressed in their verdict, and, even though this court were of the opinion that such circumstances might be reasonably reconciled with the innocence of defendant, such fact does not warrant interference with the determination of the jury." People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631, 635.

Appellant suggests that "the record would indicate * * * that the defendant is guilty of an unavoidable accident on his part with the further possibility that the Decedents were the proximate causes of their own deaths in their own negligence when they entered the intersection"; and again appellant urges "* * * It may even possibly be that the victims themselves in the manner in which they entered the intersection were not using the caution and prudence of ordinarily careful people, particularly at a blind intersection."

[8] This argument is unavailing for two reasons. In the first place, there is

nothing in the record to support appellant's implication that the driver of the victims' vehicle was guilty of negligence; and, secondly, although contributory negligence of a decedent may be available as a defense in an action to recover damages for a private injury resulting from such death, it is never a defense or excuse for crime. People v. McKee, 80 Cal. App. 200, 205, 206, 251 P. 675; People v. Leutholtz, 102 Cal.App. 493, 498, 499, 283 P. 292.

For the foregoing reasons, the judgments are and each is affirmed.

YORK, P. J., and DORAN, J., concur.

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77 Cal.App.2d 209

OWENS v. NOBLE et al.

Civ. 7267. Sac. 5770.

District Court of Appeal, Third District, California.

Dec. 10, 1946.

1. Appeal and error 🔑173(12)

Defendants could not complain on appeal because trial court granted plaintiff an accounting, on ground that there had been an accord and satisfaction between the parties, where defendants not only did not plead any accord and satisfaction but in their answer and cross-complaint alleged that there had never been an accounting between the parties and prayed for an accounting.

2. Appeal and error 🔑882(3)
Pleading 🔑370

The theory of a case as presented by the pleadings and on which it is tried determines the course of the action and must be adhered to throughout the proceedings until the conclusion of the case on appeal.

3. Accord and satisfaction 🔑25(1)

Generally an agreement of accord and satisfaction as a defense must be specifically pleaded.

4. Accord and satisfaction 🔑27

Whether there was a dispute concerning amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact.

5. Partnership 🔑328(3)

In action for dissolution of partnership formed for buying and selling livestock, and for an accounting, wherein defendants contended that certain cattle purchased by it were purchased solely for breeding purposes and were not intended to be considered as partnership assets, evidence sustained findings for plaintiff.

6. Partnership 🔑328(3)

In action for dissolution of partnership formed for buying and selling livestock, and for accounting, evidence sustained finding that all cattle were considered in the partnership, including cattle which were carried over from one year to the next, and that plaintiff was not entitled to share only in profits from sales made each year as contended by defendant.

7. Partnership 🔑344

An action for dissolution of partnership and for an accounting, wherein complaint was amended without objection by defendants and the words "an undeterminate sum" substituted for figures $4,788.51 in statement of amount of recovery sought, plaintiff's maximum recovery was not limited to $4,788.51.

8. Appeal and error 🔑110

Order denying a new trial was not appealable.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by William R. Owens against E. B. Noble and Westover Company, a corporation, for dissolution of alleged partnership and for settlement of business and accounts of partnership, wherein the defendants filed a cross-complaint. From a judgment for the plaintiff and from an order denying defendants' motion for a new trial, the defendants appeal.

Judgment affirmed, and appeal from order denying new trial dismissed.

Pugh & Pugh and Fred C. Pugh, all of Red Bluff, for appellants.

Curtiss E. Wetter, of Red Bluff, for respondent.

ADAMS, Presiding Justice.

The complaint in this action was stated in two counts, but was tried upon the first one only. It was alleged in said first count that the defendant Westover Co. is a corporation; that on or about March 1, 1938, plaintiff and defendant corporation, acting through defendant E. B. Noble, orally formed a partnership for the purpose of buying, running and selling cattle; that by the terms of said partnership agreement the Westover Co. was to purchase livestock, and plaintiff was to devote his time to the management of the partnership affairs, and the partners were to share equally in the profits and losses, and that the firm was to continue until dissolved by consent of the partners; that the partnership continued until February 2, 1943, when it was suspended; that at the time of said suspension there was due and unpaid to plaintiff as his part of the profits the sum of $4,788.51 (subsequently amended to read "an undetermin*ate* sum"), which money was in the possession of defendants and to which plaintiff was entitled. The prayer was for the sum of $4,788.51 and costs of suit, that "The dissolution of the said partnership be declared and a settlement of the business and accounts of said partnership be made," and for general relief.

Defendants filed an answer and a cross-complaint. In the answer they admitted the formation of the partnership "for the purpose of buying, running and selling cattle," but alleged that under the agreement defendant Westover Co. was to purchase cattle, furnishing the entire capital for purchasing, shipping, feeding and caring for same; that cattle were purchased in the fall, wintered on defendants' ranches and range, and in the summer taken to defendants' summer ranges and there kept until sold. They denied that plaintiff was to devote his time to "the management of partnership affairs," alleging that he was to devote his time to care of the cattle, and that the corporation, through Noble, generally provided the management of said partnership. They further alleged that the partnership was dissolved by mutual consent on February 2, 1943, and denied plaintiff's allegation that there was money due him. They further alleged, however, that "there has been no accounting had as to the number of cattle on hand, and as to other assets belonging to said partnership on February 2, 1943, or at all, or as to the expenses incurred by said partnership in connection with the feeding and care of cattle on hand, nor have the net profits, if any, to be divided between said partners been ascertained." They prayed that "an account be taken of all the said copartnership dealings and transactions and all money received and paid by plaintiff and by defendants respectively, and that after the partnership debts and liabilities are paid, the surplus, if any, be divided between plaintiff and defendant Westover Co. according to their respective interests, and for such other and further relief as may be just and equitable, and for defendant's costs."

In their cross-complaint defendants alleged the formation of the partnership, but asserted that Owens was to devote his time to the care of the cattle under the management of Noble, and that the cattle purchased should be sold annually and the net profits divided equally between plaintiff and the corporation. They again alleged that the partnership had been dissolved by mutual agreement on February 2, 1943, that there had never been a full and complete accounting of the affairs of the copartnership, that a dispute had arisen as to the number of cattle and other property on hand at the time of the dissolution, and again prayed for an accounting and for general relief.

The cause was tried by the court sitting without a jury, it being agreed by counsel for the parties that it should be tried upon the first cause of action and the cross-complaint. Findings were made in accordance with the complaint filed by plaintiff, to wit, that the partnership was formed for the purpose therein alleged, that plaintiff was to devote his time to the management of the partnership affairs, and that he and the corporation were to share equally in profits and losses; that the partnership was terminated on February 2, 1943, but that at that time there were on hand a number of cattle in the profits of which plaintiff had an interest, said profits being undetermined; that no accounting was had at the time the partnership was terminated, except the annual accounting to October 7, 1940; and that by reason of the extent of the accounitng to be taken, a referee should be appointed to take and state an account of the dealings between the parties from October 7, 1940, to February 2, 1943.

An interlocutory decree was made and entered April 19, 1945, appointing a referee and stating the matters to be reported upon by him. Thereafter a report of the referee was filed, together with a transcript of testimony taken by him. Said report stated the number of head of cattle purchased between October 7, 1940 and February 2, 1943, and the price paid for same, the number sold during said period and the amount received for them, the assets on hand on February 2, 1943, and the value thereof, the expenses of the partnership, and the amounts that had already been paid to plaintiff. The conclusion was that there was a balance due plaintiff of $15,591.90.

Defendants filed objections and exceptions to the findings of the referee, but his findings were approved by the court which filed further findings of fact incorporating the former ones, and adopting those of the referee; and judgment was entered thereon awarding plaintiff $15,591.90, with interest and costs. A motion for a new trial was made and denied and this appeal is taken from both the judgment and the order denying a new trial.

On this appeal it is contended by appellants that respondent was bound by the partnership settlements of February 21, 1942 and February 2, 1943, and it was error for the court to go behind these settlements in the absence of fraud or mistake; that the trial court was not warranted, in the absence of fraud or mistake, in disregarding the interpretation of the contract by the parties, and requiring appellants to account for 1447 head of cattle in which respondent claimed no interest prior to the trial; that respondent was bound by the allegations and admissions of his complaint, and his maximum recovery should have been limited to $4,788.51; that neither the interlocutory judgment nor the final judgment is supported by the findings, and the findings are not supported by the evidence; and that the court erred in denying appellants' motion for a new trial.

[1, 2] As for the first of appellants' contentions, we are unable to reconcile it with their own pleadings. If appellants mean that there was an accord and satisfaction on February 21, 1942, and on February 2, 1943, and for that reason no testimony should have been received or considered regarding any transactions prior thereto, not only was no accord and satisfaction pleaded, but on the contrary appellants in their answer and in their cross-complaint alleged that there never had been an accounting between plaintiff and the corporation as to the number of cattle and other assets belonging to said partnership at the time of the dissolution on February 2, 1943; and in both of their said pleadings they prayed for an account of "all copartnership dealings and transactions," etc. It is therefore obvious that they are now complaining because the trial court did exactly what they asked it to do, and they cannot complain because the court granted the relief for which they particularly prayed. Watterson v. Knapp, 35 Cal.App.2d 283, 288, 95 P.2d 154; Gunst v. Zimdars, 89 Cal.App. 37, 40, 264 P. 544. In a recent case, Union Oil Co. of California v. Union Sugar Co.,— Cal.App.2d —, 173 P.2d 700, 707, the court stated the well established rule that the theory of a case as presented by the pleadings and upon which it is tried, determines the course of the action and must be adhered to throughout the proceedings until conclusion of the case on appeal; that a different practice would be unfair to the trial court and unjust to the opposing litigant. Numerous cases supporting this principle are there cited and the court said, significantly, that "A party to an action may not depart from the course it has set for itself, but must adhere to the theory on which

the case was based and not meander like a stream that changes its direction whenever a new obstacle is encountered."

The record shows that during the course of the trial it was assumed by both parties that testimony regarding all transactions subsequent to 1941 was pertinent, appellants' counsel saying, in response to a question by the court, "I think there is nothing back of the 1941 settlement." Testimony regarding transactions subsequent to 1941 was introduced by both parties. While the evidence shows that on February 2, 1943, plaintiff received a check for $22,732.80 which bore the endorsement "In full settlement of all claims of whatsoever nature against Westover Co. and or E. B. Noble," and plaintiff eventually endorsed and cashed this check, he testified that he did not at once accept it when it was tendered and at that time claimed that there were at least 28 head of holdover cattle in which he had an interest and which were not included in the account; that he did not then accept Mr. Noble's figures. Mr. Noble testified also that on February 2, 1943, plaintiff claimed an interest in other cattle, and that he subsequently met plaintiff on the range and talked with him about the additional head he was to take. Also in subsequent correspondence with plaintiff's attorney Mr. Noble admitted that there were some cattle still on the range in which plaintiff had an interest, and that there was also cotton-cake which was subject to division between the parties. Plaintiff testified that he went out to receive the cattle which he claimed but Mr. Noble would not permit him to take them. It is apparent, therefore, that at the time the check was tendered Mr. Noble himself conceded that it did not represent the full amount due plaintiff—which is in accord with defendants' own pleading.

[3, 4] As a general proposition an agreement of accord and satisfaction as a defense must be specifically pleaded (Hansen v. Fresno Jersey Farm Dairy Co., 220 Cal. 402, 409, 31 P.2d 359; Berger v. Lane, 190 Cal. 443, 447, 448, 213 P. 45; Peal v. Gulf Red Cedar Co., 15 Cal.App.2d 196, 199, 59 P.2d 183; Locke v. Meline, 8 Cal.App.2d 482, 483, 48 P.2d 176; Reed v. Cornell, 54 Cal.App. 179, 180, 201 P. 608); and here not only did defendants fail to plead accord and satisfaction, but on the contrary pleaded that there never had been an accounting. Also, as was said in Biaggi v. Sawyer, 75 Cal.App.2d 105, 170 P.2d 678, 683, quoting from Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989, "Whether there was a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court." In the case of Work v. Associated Almond Growers, 102 Cal.App. 232, 236, 282 P. 965, 966, this court quoted from cited authorities as follows: "It is an essential element in accord and satisfaction by tender of a check, that the tender is subject to the condition that the acceptance of the check is satisfaction in full. This condition is not shown by the mere fact that the debtor accompanied the check with an account showing a balance equal to the amount of the check, and *it is disproved where the giving and acceptance of the check is followed by such conduct of both parties as clearly shows that they did not consider the check a final settlement of the debt.*" (Italics added.) Also see 1 Cal.Jur. p. 134, par. 10; Lapp-Gifford Co. v. Muscoy Water Co., supra; Duncan v. F. A. Hihn Co., 27 Cal.App. 152, 155, 148 P. 971; Wallace v. Crawford, 21 Cal.App.2d 394, 404, 69 P.2d 455.

[5] Appellants' next contention is that the trial court disregarded the interpretation put upon the partnership agreement by the parties themselves, and erred in requiring appellants to account to respondent for 1447 head of cattle. It is argued that certain cattle purchased by defendants were purchased solely for breeding purposes and were not intended to be considered in partnership transactions. But what interpretation the parties put upon the agreement involves a question of fact. Also whether certain cattle were purchased solely for breeding purposes and, if so, they were not, for this reason, intended to be considered as partnership assets are questions of fact. The trial court has resolved these problems in favor of plaintiff, and we cannot say

that there is insufficient evidence in the record to sustain its conclusions. While respondent Noble testified that in the spring of 1941 he bought part of the Diamond Ranch and was going to change his operations and run a breeding herd for the account of Westover Company, he admitted that he did not discuss any change of plans with plaintiff. And regarding this so-called change in operations plaintiff testified that it was not true that the agreement between the parties related only to "feeder stuff" and did not include breeding stock; that from time to time cows were purchased not only by defendants but by plaintiff, which, together with their calves, were included in partnership operations, and that their operations included the sale of cows and calves as well as steers and bulls; that he was never told that he was not to participate in the so-called breeder stock.

[6] Also appellants argue that the agreement contemplated that plaintiff was to share only in the profits from sales made each year, and that he had no interest in such cattle as were carried over from one year to the next. Plaintiff testified that when he went into the deal all cattle were considered in the partnership; that at no time was there any segregation as between cows, heifers and "feeders"; that he was never advised that any particular cattle were not in the partnership arrangement, and there was no agreement that defendants could buy and sell cattle on their own account to the exclusion of the partnership. He also testified that cattle were usually held over for the winter if not sold during the year, and that such holdovers were counted in with partnership cattle. Appellants' argument that plaintiff had no interest in holdover cattle is hardly reasonable, for if it were true, appellants could have deprived plaintiff of his interest in cattle by merely holding them over for the winter. The books of the Westover Company carried all of the cattle under one account without segregation, plaintiff was charged with taxes on the cattle, including so-called breeding stock, and he was charged with a loss on several head of bulls. Also, according to appellant Noble, there were no cattle operations in the year 1940 and the appellants leased out their Sierra Valley and Clover Valley ranches and divided the rent money equally with respondent. This evidence is sufficient to sustain the findings of the trial court.

[7] As for appellants' next argument that plaintiff's maximum recovery should have been the sum of $4,788.51, the amount originally alleged in his complaint to be due him, the complaint was amended in this respect without objection by defendants, and the words "an undeterminate sum" substituted for the figures $4,788.51. This was done at the beginning of the trial, after appellants' pleadings had been filed in which they had prayed for an accounting and asked that any surplus found be divided between plaintiff and Westover Company. Appellants cite no authority in support of this contention and it is without merit.

Equally without merit is their contention that the judgment is not supported by the findings nor the findings by the evidence. Appellants do not refer to any specific findings that lack support in the evidence, and the substance of their argument is, in effect, that the trial court should have found in accordance with appellants' theory of what the evidence shows. It is no more than an argument on conflicts of evidence.

[8] The judgment is affirmed. As for the order denying a new trial, since such order is not appealable, the appeal therefrom is dismissed.

PEEK and THOMPSON, JJ., concur.

77 Cal.App.2d 258

SCHWARTZ v. TEUNISZ et al.

Civ. 15340.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1946.

Hearing Denied Feb. 10, 1947.

1. Master and servant ⚷80(9)

Evidence sustained finding that contract for payment of salesman's commissions was terminated on date contended by employer, but that termination of the employment of sales manager did not terminate right to commissions earned pursuant to the contract for sales of milk bottles because contract was a continuing contract for payment of commissions.

2. Master and servant ⚷21

Even though a contract of employment provides for a termination by express agreement, yet, when it is performed in part, such termination does not affect rights already accrued under it.

3. Master and servant ⚷22

Sales manager's statement in receipt, after acknowledging receipt from employer of money, that he would be entitled to further sums of money in the nature of commissions earned by virtue of certain paragraphs of employment contract, did not incorporate those paragraphs of employment contract and make them part of sales manager's agreement. Civil Code, §§ 1636, 1642, 1647.

4. Accord and satisfaction ⚷26(3)

Evidence sustained finding that sales manager's acknowledged receipt of all moneys due and owing to him under and by virtue of employment contract was not intended by the parties to extinguish commissions that might accrue and be due to sales manager for sale of milk bottles after date of acknowledgment.

5. Master and servant ⚷80(9)

In action by sales manager against employer to recover commissions under employment contract providing for commission of 25 per cent on gross proceeds received by employer for franchises sold for new type milk bottle patents and 50 per cent commission on sale of bottles to franchise holders who were sold franchises by sales manager personally, evidence sustained finding that sales manager performed according to terms of contract, so as to be entitled to commission for sale of bottles after cancellation and termination of contract.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Paul L. Schwartz against William C. Teunisz, William C. Teunisz, doing business under the name of Modern Top Milk Bottle Company, and Modern Top Milk Bottle Company to recover commissions allegedly due plaintiff under sales manager's contract for sale of franchises covering new type milk bottle patents owned by defendants. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

James D. Randles, of Los Angeles, for respondent.

Adams & Duque and Andrew Hauk, all of Los Angeles, for appellants.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before the court without a jury, in an action to recover commissions allegedly due under the terms of a sales manager's contract for the sale of franchises covering new type milk bottle patents owned by defendants and known as the "Modern Top Milk Bottle Combination," defendants appeal.

The material portion of the contract between plaintiff and defendants is as follows:

Date: May 25, 1939

Position: Sales Manager

Commissions: A. Personal Franchise Commission of 25% upon the gross proceeds received by the Company upon franchises sold by plaintiff personally.

B. Overwriting (overriding) Franchise Commission of 5% upon the gross proceeds received by the Company upon franchises sold by others than plaintiff.

C. Bottle Commission of 50% upon the gross proceeds received by the Company upon the sale of bottles or containers to franchise holders who had been sold franchises by plaintiff personally.

D. Separator Commissions at the prevailing rate upon the sales of separators to customers to whom plaintiff had personally sold franchises.

E. Renewal or Substitution Commissions (so-called Repeat Commissions) upon proceeds received by Company upon renewal or substituted franchises sold to customers previously sold franchises as above, whether plaintiff is connected with the Company at the time of the renewals or not, provided plaintiff or a person by him designated performs all services in arranging the renewals prior to the expiration of the old franchises if he is no longer with the Company.

Termination: May be effected by either party on written notice, but not to affect commissions except as above provided and not to affect any pending deal which is closed within 60 days after termination.

After the above contract was entered into plaintiff sold two or three franchises during the period from May 25, 1939 to November 3, 1939. On November 3, 1939, defendants mailed plaintiff a letter notifying him that the basic contract was canceled and terminated. Plaintiff admitted receipt of the letter but claimed that it was not delivered until two or three months after its date. Three additional letters were written by defendants to plaintiff in which they reiterated the termination of the contract. These letters were dated February 6, 1940, March 5, 1940 and March 28, 1940. On April 26, 1940, defendant Teunisz wrote plaintiff and told him that under separate cover, he was sending a cashier's check in the amount of $1,241.21 to the Citizens' Bank at Monrovia, California, together with a letter of agreement of the same date for plaintiff to sign. This check was cashed by plaintiff and the agreement signed May 6, 1940. In the answer to plaintiff's suit, in addition to general denials defendants pleaded (1) cancellation and termination of the basic agreement, and (2) a release, accord and satisfaction.

[1] Defendants contend, without merit, that there is not any substantial evidence to sustain the trial court's finding upon the following issues:

Issue No. I

Was there a valid cancellation and termination of the basic contract on or about November 3, 1939?

Findings

The court found:

"* * * (1) That it is not true that the said contract of May 25, 1939, was terminated on the 3rd day of November, 1939, but that the engagement of Paul Schwartz was terminated on the 3rd day of November, 1939, and pursuant to the terms of said contract of May 25, 1939, but that said termination of the engagement of Paul Schwartz as Sales Manager for William C. Teunisz, trading under the name of Modern Top Milk Bottle Company, did not terminate the right of plaintiff to commissions earned pursuant to the terms of said contract, in that said contract of May 25, 1939, was a continuing contract for the payment of commissions due plaintiff pursuant to the terms thereof."

Evidence

The basic contract of May 25, 1939, contains this:

"The Company engages Schwartz as its sales manager for the sale of franchises covering articles made pursuant to the foregoing patents and Schwartz agrees to act as such," and after providing for commissions he was to receive under said contract, it reads as follows:

"Fifth: On written notice by either party to the other, the engagement of Schwartz will terminate, but

"A. Such termination will not affect commissions on renewals or substitutions, except as hereinabove provided for [such exceptions refer to the default by plaintiff or his estate arranging for renewals or extensions and is not material here], and

"B. Such termination will not affect any deal in the process of negotiation at the time of termination which is closed within sixty (60) days after the termination, provided, however, that Schwartz stands ready and offers his services in trying to consummate the negotiation of the deal and further provided that the deal is actually consummated within sixty (60) days.

"Sixth: This agreement binds the heirs, executors, administrators and assigns of each of the parties."

On November 3, 1939, defendant wrote a letter to plaintiff which contains the following statement:

"This, of course, will terminate your contract with us entered into the 25th day of May, 1939. This will not, however, effect [sic] your commissions of said contract other than the 5% overwriting, which we have in the past paid you on all salesmen appointed by you, and which you will continue to receive on any business they have received prior to this termination."

The foregoing quotation from the basic contract together with the quotation from the purported cancellation of November 3, 1939, sufficiently sustains the finding complained of. However, other evidence showed conclusively that it was the intention of the parties that the basic contract was to continue and, as a matter of fact, did continue insofar as payments of commissions to plaintiff were concerned.

The deposition of Gustav W. Rhadans contains this:

"Interrogatory 8: (B) Itemize by giving date and amounts paid to Paul Schwartz, plaintiff in this action, from *November 3, 1939* to *February 14, 1944,* on account of the licensee commissions received by Modern Top Milk Bottle Company from the following list of dairies: (Here the witness itemizes the accounts from the various dairies and then sums it up.)

"The total of all the foregoing commissions for this period is $9,074.64." (Italics added.)

"Interrogatory 9: Please itemize all payments made by Modern Top Milk Bottle Company to Paul L. Schwartz, plaintiff in this action (showing date of payment and amount paid for each dairy and glass company account) from November 3, 1939 to February 14, 1944.

"Answer: In answer to Interrogatory No. 9, I will say that the foregoing answer covers all moneys paid to Paul Schwartz on all classes of commissions between November 3, 1939 to February 14, 1944. It is a complete statement of what we have done with him and what we have paid him."

Also from the testimony of Gustav W. Rhadans in the deposition:

"Q. In your former testimony you stated that all bottle commissions paid to Schwartz for this period and all other commissions of all kinds total $9074.64. A. Yes.

"Q. From what period to what period is here covered? A. From November 3rd, 1939, to February 26th, 1943."

"Q. In your former testimony you stated, under the head of 'Expense Items' (which appears to be at the top of page 10 of this deposition), several items. Whether or not these were charges made against Paul Schwartz, and deducted from his commissions? A. Yes.

"Q. Did the company, the defendant in this case, communicate to Schwartz anything in relation to that? A. Yes.

"Q. What was that? A. That was a monthly sales statement on which the amounts due him were stipulated and the checks paid him and the expense items charged to him.

"Q. Did he ever make any complaint in this connection? A. Not to my knowledge.

"Q. With reference to that same paragraph your last item is 'Social Security deduction, $1.63'. Will you kindly explain that? A. He received the check in the amount of $160.87. $1.63 was deducted from the amount of $162.50, leaving that as a balance, $160.87.

"Q. What were all the other items in that paragraph? A. Those are charges against him.

"Q. Did you charge off social security or charges of that kind? A. Yes."

Thus, as we review the basic contract we find by the very wording of it that it was contemplated by the parties that it should be a continuing contract extending even beyond the grave, for it provided for conditions covering the estates of the parties and even as to the legal obligations of the "heirs, executors, administrators and assigns of each of the parties." However, as to the relationship of plaintiff as sales manager for defendant, that was quite another matter and it was specifically provided in said contract how said relationship might be terminated and what the effect of said termination would be.

The contract expressly defines what it meant by the word termination. Again we quote from the basic contract:

"Fifth: On written notice by either party to the other, the engagement of Schwartz will terminate, but

"A. Such termination will not affect commissions on renewals or substitutions, except as hereinabove provided for, and

"B. Such termination will not affect any deal in the process of negotiation at the time of termination."

If the basic contract was not sufficiently clear on this point, it was certainly clarified by defendant's letter of November 31, 1939, in which defendant again emphasizes what was meant in the basic contract by the word "terminate". We quote from this letter:

"This, of course, will *terminate* your contract with us entered into the 25th day of May, 1939. *This will not, however, effect* [*sic*] *your commissions of said contract* other than the 5% overwriting." (Italics added.)

This contract was not an executory contract in so far as the franchises already sold were concerned, nor was there a mutual consent by the parties to its termination.

[2] Even though a contract provides for a termination by express agreement, when it is performed in part such "termination" does not affect the rights that have already accrued under the contract.

This is stated in Winter v. Kitto, 100 Cal.App. 302, 310, 279 P. 1024, 1027, thus:

"The grounds for the claim in the present case that the vendor rescinded the contract were the statements in the notice of default that she elected 'to cancel the contract pursuant to the terms thereof,' and that the same 'is hereby canceled and is absolutely void and of no effect,' and the statement by her attorney in his letter to the vendee that the contract by reason of the letter's default had been canceled and was no longer existing. It has been held that a provision in a contract to the effect that a violation of any of its terms or conditions by either party should work a forfeiture and the contract should thereupon become void and of no effect means only that the rights of the party violating it cease, and, as to him and to that extent, the agreement becomes void and of no effect. The contract, however, remains in effect so as to protect the rights of the innocent party and to enforce the obligations of the delinquent. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 Pac. 177." See also Martinelli v. Hogrefe, 123 Cal.App. 438, 440, 11 P.2d 412.

That the basic contract continued in effect is definitely proved by the payment of commissions and monthly statements sent to Schwartz by the defendant.

In the receipt of April 26, 1940, after acknowledging receipt of $1,241.21 for all sums then due him, the plaintiff states:

"I further agree and declare that I will be entitled to further sums of money in the nature of commissions earned by *virtue* of paragraphs 4 and 5 of said agreement (May 25, 1939) * * *." (Italics added.)

This language is plain and unambiguous. Schwartz was to be entitled to commissions by virtue of the basic contract. This instrument was not intended to replace the basic contract, but rather the language plainly emphasizes the fact that the basic contract was to continue in effect so that Schwartz would receive his commissions.

[3] This language cannot be construed as incorporating paragraphs 4 and 5 of the basic contract and making them a part of this agreement. The words "by virtue of" can only be interpreted to mean that Schwartz was to be entitled to commissions by right of the basic contract. There is no other reference to commissions to be earned in this instrument.

The agreement of July 30, 1940, expressly provides that it shall not affect business written by Schwartz in accordance with the agreement dated April 26, 1940. Also the franchise right in this contract was 30 per cent and no payments were made on that commission percentage.

The agreement of August 14, 1941 provides:

"It is mutually agreed that business written by you under a *prior agreement,* if any, should be honored in accordance with the terms of *said agreement* by you and the Company. However, you shall write all agreements after the date of this contract in accordance with the terms stated herein." (Italics added.)

That this contract is not material here is brought out in the examination of Mr. Schwartz in which the following testimony occurs:

"Q. And the Ragland Dairy of Bakersfield, California, Mr. Schwartz, have you computed the money paid by them in this case? A. No, I was not interested in that billing because that account was sold under Contract No. 3 and should not have been in this Bill of Particulars."

Issue No. II

[4] *Was there a valid release and an accord and satisfaction effected which extinguished the basic contract and obligations thereunder on or about April 26, 1940?*

Findings

"(2) The court further finds that it is true that on or about April 26, 1940, the plaintiff, in writing, acknowledged receipt of all moneys *due and owing to him* under and by virtue of the terms of said agreement dated May 25, 1939, but the court specifically finds that said acknowledgment and receipt did not contemplate nor was it in the mind of the parties that said receipt should contemplate payments that might accrue and be due to plaintiff subsequent to April 26, 1940.

"(3) The court further finds that it is not true that since the said 26th day of April, 1940, there have been no sums of money due or payable from the defendant, William C. Teunisz, or the Modern Top Milk Bottle Company to this plaintiff under or by virtue of said agreement dated May 25, 1939, but that certain sums were due this plaintiff as set forth in the finding above.

"That, as to defendant's further, second, separate and affirmative defense, the court finds as follows:

"(1) That it is not true that on or about April 26, 1940, the said defendant, William C. Teunisz, paid to the plaintiff the sum of $1,241.21 in satisfaction of all of plaintiff's claims under the said written agreement dated May 25, 1939, or that the plaintiff agreed to or did accept said sum as full payment or in full satisfaction of all sums due him under and by virtue of the terms of said agreement, but, on the contrary, the court finds that the sum of $1,241.21 paid by defendant to plaintiff on the 26th day of April, 1940, was the amount that was agreed upon by and between the parties as being the sum *then due* plaintiff from defendant on the said 26th day of April, 1940, and the court specifically finds that said payment of $1,241.21 did not contemplate the satisfaction of amounts that might thereafter become due and payable to plaintiff under and by virtue of the terms of said agreement dated May 25, 1939."

Evidence

In defendant's Exhibit "A", plaintiff acknowledged receipt of $1,241.21 from defendant, "for all sums *due* me under and by virtue of the terms of an agreement dated, May 25, 1939." (Italics added.)

Included in the same instrument is the following:

"I accept said sum of money for the purposes above stated and I further hereby state and declare that all of my right of hire and employment by virtue of said contract was wholly terminated and ceased as of November 3, 1939.

"I further agree and declare that I will be entitled to further sums of money in the nature of commissions earned by virtue of paragraphs 4 and 5 of said agreement. * * *."

The evidence cited under issue No. 1 above, as to the parties continuing to act under the basic contract as to payments, etc., is also material on this issue.

The following evidence proves that there was a dispute over the *amount* of money that was due and that there was no dispute as to the obligation of the defendant to pay commissions under the contract. The following is testimony by the plaintiff when called by counsel for defendant under C.C.P. § 2055:

"Q. And you and he were having a dispute as to whether or not you were still entitled to anything under the contract were you not? A. No, there wasn't any dispute about that. * * *

"Q. By Mr. Duque: Now, as I understand your answer to the previous question, Mr. Schwartz, you say that you were not having a dispute with Mr. Teunisz between the date of November 3, 1939, and April 26, 1940, is that correct? A. Not on the terms of the contract. Only on the payment of the commissions due me, that was the dispute, yes, sir.

"Q. Was there any dispute between you as to whether the contract was canceled or whether it was not canceled? A. No, the paper that I had signed on April 26, 1940, which he claims nullified the contract of May 25, and all that preceded, that was never accepted by me personally as a release to him, he knew that I was desperately in need of moneys for four months which I had earned and collected for him, and sent to him, and which he refused to pay me those commissions on. I wired him several times—

"Q. Now, just a minute—. A. Just a minute, this is very important. I wire him several times and told him that I would bring suit unless he paid me in full immediately, and that check that he sent in for $1,241.21, was in response to my suit for past due accounts, that was no settlement or no nullification of any contract whatever. * * *

"A. There was no dispute between the Modern Top and myself regarding the cancellation of a contract as written May 25, 1939. The dispute between Mr. Teunisz and myself was regarding the past due delinquent payments."

It is agreed that there was a dispute between plaintiff and defendant at the time the instrument of April 26, 1940, was signed by plaintiff. This dispute is evidenced by letters, as well as oral testimony, and is shown to be over the amount of money that was then due Schwartz for commissions earned by him.

Defendants wrote a letter to Schwartz on January 23, 1940, during this period of dispute which contains the following statement:

"This is to inform you that as per your recent wire, asking for money, that your account is still in the 'red'. However, if you are in need of money, it is our suggestion that you take steps immediately to make collection on the following accounts, on which you are entitled commission under your old working agreement. * * *

"Upon receipt of these checks your account will be out of the 'red' and as soon as this is accomplished, we will mail you a check for whatever is coming to you."

Also the letter of February 6, 1940 to Schwartz from defendant's sales manager states:

"This is the only credit that you are legitimately entitled to under this section of your contract which was declared null and void November 3, and which no further credits on new business will be given after January 3, 1940.

"After payments come in and renewal of franchises are accepted, your account will be credited accordingly."

These letters make it plain that there was no intent on the part of either of the parties to question the obligation of the Company to pay commissions on franchises already sold by Schwartz.

There was a dispute as to certain expense items that were deducted from his account and also as to what amounts had been paid to defendant by various dairies. There is nothing in the letters, however, that would indicate an attitude of "There is no more liability on the part of the Modern Top Bottle Company for payments of commissions for franchises already sold under the contract."

Without such an attitude being shown there can be no interpretation of the receipt of April 26, 1940, that would give this instrument the effect of canceling all future liability under the contract of May 25, 1939.

Defendants have cited Mathews v. Pacific Mutual Life Insurance Co., 47 Cal. App.2d 424, 118 P.2d 10, as supporting the contention that an accord and satisfaction was created although future payments were involved. The principle of the Mathews case is sound, but not applicable here.

As to the point at issue the court states, 47 Cal.App.2d at page 428 et seq., 118 P.2d at page 12:

> "Payments were not required in the event of his recovery, however, and at the time the settlement was made in 1932, no one could tell when that event would occur. As a matter of fact, *defendants then contended that such event had already occurred,* and at the time of such settlement there was a serious dispute as to whether any more payments were due under the policy."

Liability of the defendants for commissions earned by Schwartz was never in dispute. The dispute was over the amounts that were received by the defendant for franchise sales, certain deductions and allowances for expenses, and similar accounting problems, but did not concern the basic liability of the defendant to pay commissions for services rendered by Schwartz.

Issue No. III.

[5] *Assuming that the basic contract had been extinguished by cancellation and termination by release or by accord and satisfaction, did plaintiff perform according to the terms of the contract so as to be entitled to any commissions?*

Findings.

The court found:

"2) That at the time of making said contract of May 25, 1939, the defendant, William C. Teunisz and the plaintiff, Paul Schwartz, had in mind and contemplated the matter of fixing the commissions due plaintiff on account of certain franchises which had been sold by plaintiff for defendant to certain firms and dairies or were then in the process of selling or would thereafter be sold under the terms of said agreement by this plaintiff.

"3) That within three years prior to the commencement of this action and pursuant to said contract of May 25, 1939, and sale of franchises by this plaintiff and for the said William C. Teunisz, the plaintiff earned and became entitled to receive certain commissions from the defendant, William C. Teunisz, because of certain sums paid to defendant, W. C. Teunisz, on account of said sales.

"4) Pursuant to said contract of May 25, 1939, there is due the plaintiff by reason of commissions earned under Subdivision A of the fourth paragraph of said contract to wit: '25 percent of the gross proceeds from all franchises sold by Schwartz personally, the following sums * * * total due plaintiff on above commissions under Subdivision A of the fourth paragraph of said contract, $2,680.13.'"

Evidence

The parties intended at the time of the execution of the basic contract to include all of the transactions already performed by plaintiff under the existing agreement.

The following is from the cross-examination of Mr. Schwartz by Mr. Duque:

"Q. Yes, the contract was entered into on the 25th of May, 1939, and you say you sold the franchise to Borden in March of 1939? A. That is right, but it was understood with Mr. Teunisz that I was to be paid that. It took me five months to get him to sign a contract, he kept stalling me from day to day until I caught him in New York, in my attorney's office there, and I insisted that he sit down and dictate the terms of that contract which covers me in everything which I have sold up to that time and after that time.

"Q. By Mr. Duque: Then, as I understand your testimony, which you have just given, you sold the Borden account in 1939? A. That is right.

"Q. But you claim commissions of 25% on that sale because it was—it is your contention that that sale was covered by this contract even though the contract had not been written then, is that correct? A. That is right. It was understood that any contract made by Mr. Teunisz and myself, covered everything that I had written under it up to and after the date of the contract. * * *

"Q. Had you been negotiating the terms of this contract of May 25, 1939, for some little time? A. For at least five months, yes, sir.

"Q. And during that time, had you been discussing this matter with Mr. Teunisz? A. Yes, sir, day and night, sir.

"Q. And at the time that this contract was entered into, Mr. Teunisz had full knowledge of the contract to Borden? A. Oh yes, yes, sir.

"Q. Was that discussed at the time that you signed this contract? A. Oh, yes, sir, in Mr. Teunisz' office."

That this was the intention of the defendant also is brought out in the attitude of both Rhadans, defendant's accountant, and Irving H. Smith, *defendant's attorney*, when taking the deposition on August 31, 1945, that is defendant's Exhibit "D" by reference. The defendant Teunisz was present at the time and confirmed all of the statements made by Mr. Rhadans. The following is the testimony of Mr. Rhadans on examination by Mr. Smith:

"Q. And does that cover all commissions as contemplated by the original contract dated May 25, 1939, as long as it was in force? A. Yes.

"Q. You say that you ceased paying the overriding or the five percent commission on September 1st, 1942, *which were paid on the original contract, the one sued on here.* Did Mr. Schwartz at any time after that make any complaint because he was not still receiving this class of commission? A. No, sir." (Italics added.)

It is apparent that the parties considered the sales of franchises by Schwartz to be sufficient performance of the contract to entitle him to be paid commissions earned under the basic contract up to September 1, 1942. There is no dispute of any kind as to whether Schwartz was to receive payments for franchise sales made under the contract—at least up to the time of trial.

The Civil Code provides in Section 1636 that:

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

The Civil Code provides in Section 1642 that:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Here the parties entered into a contract of employment. Plaintiff, Schwartz, was to sell certain franchise rights for defendant Bottle Company and the Bottle Company was to pay him certain specified commissions. Schwartz then performed according to that agreement and did sell certain franchises and he was paid the specified commissions. It was not until he took his trip to the East, some five months later, that the contract was formally executed and signed by Mr. Schwartz and defendant Teunisz. Both parties were aware of the sales that had been made up to that time, and there was no language in the basic contract to exclude those sales but rather the general language used is to be considered as an intent to include those sales under the circumstances. (Civil Code, sec. 1647.)

Later contracts between the parties expressly provided for the effect of prior dealings and whether or not they were to be included, as in the contract of July 23, 1940, where it states:

"This agreement will not effect [sic] business written by Schwartz in accordance to [sic] agreement dated April 26, 1940, between Teunisz and Schwartz."

Again in the contract of August 14, 1941, it is said:

"It is mutually agreed that business written by you under a prior agreement, if any, shall be honored in accordance with the terms of said agreement. * * *"

The fact that both parties acted under the basic contract as to payment of commissions on all the sales in issue here, is conclusive as to their intent under the contract. The basic contract is the only source of obligation under which the defendants had to pay these commissions. For a period of over three years the defendants paid the plaintiff over $9,000.00, and neither side during that time questioned the obligation of the defendants to pay. If there was any question as to the sufficiency of plaintiff's performance, defendants should have raised the issue before this.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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HUFFAKER v. DECKER.

Civ. 7260.

District Court of Appeal, Third District, California.

Dec. 21, 1946.

1. Appeal and error 🔑82(3)

Order denying plaintiff's motion for relief from judgment for defendant after demurrer was sustained to complaint, and for permission to file an amended complaint, was appealable as a "special order made after final judgment", and alleged error in such order could not be reached through an appeal from the judgment. Code Civ.Proc. §§ 473, 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order Made After Final Judgment".

2. Municipal corporations 🔑741(1), 742(4)

Where a governmental agency is by statute made responsible for the torts of its agents, the requirement that a verified claim be filed with such governmental agency within the time specified is a mandatory prerequisite to the maintenance of suit therefor, and a complaint which fails to allege compliance with the statute fails to state a cause of action against the public agency.

3. Municipal corporations 🔑745½

There is no common-law right of action against a governmental agency, such as a city, for the torts of its officers or employees when acting in a governmental capacity.

4. States 🔑195, 197

Where a state waives its immunity from liability, it may attach conditions to the exercise of rights granted against it, and the presenting of a claim for damage before suit required by the statute is a condition to the maintenance of the action under the statute.

5. Municipal corporations 🔑741(1), 742(4)

The statute respecting filing of claim for damages from employee's negligence against specified public bodies was applicable to tort claim against city's employee as well as to city, and complaint in action for injuries against city employee alone was demurrable for failure to comply with statute. Government Code, § 1981.

6. Constitutional law 🔑305
Municipal corporations 🔑723½

The statute respecting filing of claim for damages from employee's negligence against specified public bodies, though construed as applicable to tort claim against city's employee as well as to city, does not deny due process to one injured through employee's negligence. Government Code, § 1981.

7. Constitutional law 🔑208(16)
Municipal corporations 🔑723½

The statute respecting filing of claim for damages from employee's negligence against specified public bodies is not unconstitutional as "special legislation" insofar as it requires the filing of tort claims for damages as a prerequisite to suit against a city employee. Government Code, § 1981.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Legislation".

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by V. J. Huffaker against Claude Decker to recover for injuries allegedly sustained by plaintiff because of defendant's negligence in operation of a truck. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Alfred E. Frazier, of Red Bluff, for appellant.

Carlton and Shadwell, of Redding, for respondent.

LEMMON, Justice pro tem.

Plaintiff instituted an action against the defendant, Decker, to recover damages for injuries claimed to have been proximately sustained through the negligence of Decker. It was alleged in the complaint that such negligence occurred while Decker was driving a Ford truck, owned by the City of Redding, and that he was then the employee of the city and acting within the scope of his employment at the time of the accident. A demurrer was interposed upon the ground that the complaint did not allege compliance with sections 1980, 1981 and 1982 of the Government Code. The demurrer was sustained with leave to amend the complaint. Plaintiff failed to amend within the time allowed by the trial court and a judgment in favor of the defendant was entered. This appeal is from that judgment.

Subsequently to the entry of the judgment plaintiff noticed and presented a motion to the trial court under Section 473 of the Code of Civil Procedure for relief from the judgment and for permission to file an amended complaint, a copy of which amended complaint was served and filed with the moving papers. In the proposed amended complaint Decker was again named as the sole defendant. This pleading contains two counts. The first count charges negligence upon the part of the defendant without reference to his employment by the City of Redding. The second count alleges the employment by the city and negligence by the defendant while acting within the scope thereof. That count attempts to set up an estoppel. An order was filed and entered denying the relief sought. No appeal has been taken from that order.

[1] It would serve no useful purpose to here set forth the allegations upon which appellant seeks to base the estoppel. Aside from the absence of any allegation in the proposed amended complaint of any act done or statement made by the defendant or by any one as his agent or acting upon his behalf, the absence of which renders the pleading an ineffectual attempt to allege an estoppel, the appeal here under consideration, as above stated, is from the judgment and not from the subsequent order. Such an order is a special order made after final judgment and is appealable under Section 963, Code of Civil Procedure. Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, 153 P.2d 714. Error claimed in such an order may not be reached through an appeal from the judgment but only through a direct appeal from the order. Thompson v. Alford, 128 Cal. 227, 60 P. 686.

This appeal does however present the question of the propriety of the order of the trial court sustaining the demurrer to the complaint. It is appellant's position that where a tort-feasor is sued individually, though acting for and within the scope of his employment by a municipality at the time of the commission of the tort, the presentation of a claim in the form and substance and within the time provided in Sections 1981 and 1982 of the Government Code is not a prerequisite to the commencement of the action. The pertinent portion of Section 1981 reads: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment * * * within ninety days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be." Section 1982 of the same code specifies the contents of the claim so required to be filed.

[2-4] It is uniformly held that, when a governmental agency is by statute made responsible for the torts of its agents, the requirement that a verified claim be filed with such governmental agency within the time specified is a mandatory prerequisite to the maintenance of suit therefor. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13; Redlands High School District v. Superior Court, 20 Cal. 2d 348, 125 P.2d 490; Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831; Johnson v. County of Fresno, 64 Cal.App.2d 576, 149 P.2d 38. A complaint which fails to allege compliance with the statute fails to state a cause of action against the public agency. 18 Cal.Jur. 1110. Plaintiff, conceding this rule and that the demurrer would have been properly sustained had the City of Redding been the defendant, con-

tends that when the City's employee is alone sued presentation of the claim to such employee is not a mandatory requirement before suit. He points out that this distinction should be drawn for the reason that the action against the employee is recognized in the common law but the action against the city employer is created by statute. There is no common law right of action against a governmental agency for the torts of its officers or employees when acting in a governmental capacity. It is recognized in the cases that when the state waives its immunity from liability it may attach conditions to the exercise of rights granted against it, and that the presenting of a claim for damage before suit required by the statute is a condition to the maintenance of the action under the statute. Plaintiff argues that since the cause of action against the employee exists independent of the statute, a different result should be reached when the action is alone against him because the rights of the public are not there involved.

Although this point had not been heretofore definitely decided by an appellate court in this state it was incidentally referred to in the cases of Von Arx v. City of Burlingame, 16 Cal.App.2d 29, 60 P.2d 305, and Johnson v. County of Fresno, supra. In the Von Arx case [16 Cal.App.2d 29, 60 P.2d 309], a claim had been filed with the defendant City of Burlingame but not against the two defendant police officers. During the trial, the action was dismissed as to one of the officers and judgment went against the other officer and the City. A new trial was granted as to that officer. The City appealed from the judgment. The court stated that the failure to present a claim to the officer does not exonerate the officer from negligence, "but is simply a waiver of the injured party's right to recover against such officer" and that notice to a governmental employee is "For the protection of the employee against unfounded and annoying litigation." In Johnson v. County of Fresno, an action against the County of Fresno and one Willmirth, for injuries received in a collision in which an automobile belonging to the County and driven by Willmirth, its employee, was involved, a judgment of dismissal, entered after a joint demurrer of the two defendants to plaintiff's second amended complaint was sustained without leave to amend, was affirmed. Upon appeal the court stated that [64 Cal.App.2d 490, 149 P.2d 39] "The sole question presented is the necessity for filing such a claim before an action for damages can be maintained against a county or its employee."

[5] If we look alone to section 1981 the language which states the requirement of presentation and filing of the claim with the clerk or secretary of the legislative body of the public employer applies equally with the requirement of presenting and filing with the office or employee. A dual duty is there stated, joined by the conjunctive "and." No distinction is therein made between the two duties. It would therefore appear, from the context of the section, that compliance with the requirement in the one instance is just as essential as it is in the other. Since the legislature is to be presumed to have known of the decisions construing this as well as similar statutes, as to the requirement of filing of a claim as a necessary preliminary to the maintenance of an action against a public agency, it is persuasive that, in adding the requirement for filing with the officer or employee prior to suit, the legislature intended that non-compliance would have the same legal result in an action against such officer or employee as it had been settled by the cases to have when the action is against the employer. In re Halcomb, 21 Cal.2d 126, 130 P.2d 384.

The underlying reason for this condition to the maintenance of an action against the state or a public agency is to protect the public from the cost and expense of needless litigation. It is stated in the early case of McCann v. Sierra County, 7 Cal. 121: "We think the intention of the Legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she should be charged with the costs of a suit." In addition, the authorities of the public body are thereby afforded the opportunity to investigate the circumstance, examine the locality in which the injury is alleged to have occurred, and to discover the witnesses promptly so as to ascertain the facts while their recollections are fresh. Aside from the fact that the public is interested in saving its officers and employees from the harassment of vexatious litigation, it is directly and peculiarly concerned in any action against its employees in suits against them for damages occasioned through their negligence while acting as such employees and within the scope of their employment. This is so because Section 2001 of the Government Code casts the duty upon the attorney for the municipality to act as counsel in defense of such action against the employee and the fees and expenses incurred therein are a lawful charge against the municipality. Furthermore, Section 1956 authorizes a municipality to insure its employees against the liability for such negligence and the premium for such insurance is therein declared to be a proper charge against the treasury of the municipality. It is thus seen that the city has a financial liability in any action brought against its employee under the above stated conditions, though perhaps the liability is not usually as great as it is where the city is sued. In either situation the difference in the liability is merely a matter of degree. The city is concerned with the expenditures of its funds regardless as to whether those expenditures are great or small.

[6] It should be noted that the statute does not deprive the injured person of his cause of action against the employee. That remains as it was before the statute was enacted. He is not denied due process. Young v. County of Ventura, 39 Cal.App. 2d 732, 104 P.2d 102. The statute merely places upon him a reasonable procedural requirement to the maintenance of his action.

[7] At the time of oral argument, plaintiff claimed that section 1980 is unconstitutional as special legislation in so far as it requires the filing of such claims for damages as a prerequisite to suit against an officer or employee. He did not cite any authority to sustain his position. The principles under which the state may provide procedure applicable alone to public employees and officers for the collection of judgments against them are equally applicable here. Ruperich v. Baehr, 142 Cal. 190, 75 P. 782; Lawson v. Lawson, 158 Cal. 446, 111 P. 354.

The judgment appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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77 Cal.App.2d 398

FALKENSTEIN v. STEELE.

Civ. 15370.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1946.

1. Landlord and tenant 🔑291(13)

In landlord's action against tenant for unlawful detainer of leased premises on ground that tenant was in default in payment of rent and had breached conditions in lease relating to painting and cleaning of premises and to conduct of business thereon under designated name, evidence was sufficient to show that tenant had paid rent and had complied with conditions of lease.

2. Appeal and error 🔑1071(4)

A judgment would not be reversed or new trial ordered for mere clerical error which was committed by omitting the letters "un" as preface to word "true" in finding which stated that "allegations in paragraph IV are true".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Unlawful detainer action by Josephine Hunter Falkenstein against Ralph Steele, From the judgment, the plaintiff appeals.

Affirmed.

Arthur C. Miller and Lee A. Solomon, both of Los Angeles, for appellant.

Romaine Hogan, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals from an adverse judgment in an action brought by her as owner and lessor for the unlawful detainer of property leased by her to the defendant. The lease is in writing and the property covered by it consists of a small cafe building, service station, garage, and 6 cabins, located on the state highway between Bakersfield and Los Angeles and known of "Caswell Station."

Under the first cause of action of plaintiff's complaint a default by the defendant in payment of the rent provided for in the lease is alleged, and under a second cause of action the defendant is charged with the breach of certain conditions of the lease in failing to paint and clean the premises and using a name thereupon other than "Caswell Station." The complaint further alleges the service upon defendant of a three-day notice demanding the payment of the rent claimed to be in default or the surrender of the demised premises, and the subsequent service on defendant of a notice as required by the lease of plaintiff's intention to terminate it by reason of defendant's failure to perform the covenants and conditions heretofore described.

The trial court found that, although by the terms of the lease the rental payments were to commence on May 18, 1945, the defendant was not given full possession of the demised premises by plaintiff until July 15, 1945; that defendant did obtain possession of a portion of the premises on or about the effective date of the lease but that no proof as to the reasonable value of the use and occupation of that portion so utilized was offered or proven at the trial, and that no rentals became due to plaintiff from defendant on May 18, 1945.

The court further found that in accordance with the terms of the lease and within thirty days after defendant got full possession of the demised premises, defendant cleaned and painted all buildings in the lease described and cleaned and placed in order, to the satisfaction of plaintiff, the grounds and premises, all at his own cost and expense, which was in lieu and in full payment of the first month's rent from June 18, 1945, to July 17, 1945; that on July 18, 1945, defendant paid plaintiff $300 as rent under the lease for the period to August 18, 1945.

Under the second cause of action of plaintiff's complaint, the court specifically found that defendant did paint and clean the demised premises to the satisfaction of plaintiff as in the lease provided, and at all times did operate the business and premises mentioned in the lease under the name and style of "Caswell Station" and not otherwise. The plaintiff contends that the evidence is insufficient to support the findings, that both fact and law require the reversal of the judgment, and that the findings are contradictory and do not support the judgment.

In support of the court's findings the record discloses evidence that, pursuant to the terms of the lease and in lieu of the payment of the first month's rent of $300, defendant employed painters and expended the sum of $585 for the painting of such premises; that although plaintiff had first required that the color of the paint should be white, the parties subsequently agreed upon a cream color paint, and this color was used thereon and that plaintiff never thereafter complained to defendant about the way that the buildings had been painted. There is further evidence to the effect that all the buildings were painted both inside and out, excepting the inside of the cafe and the fronts of three of the cabins. As to these particular portions of the premises the record reveals evidence that as to the inside of the cafe "the woman who had leased it previously had painted it a beautiful white and it had not been used." With reference to the front of the three cabins there is testimony which the court was entitled to believe to the effect that they were not painted because there were vines there and plaintiff did not want these fronts changed. Plaintiff further complains that the evidence shows the panels on the screen doors and window trimmings of these same three cabins were not painted but were left with their original chocolate brown or black color. There is no evidence, however, of the dimensions of these unpainted panels and trimmings or that plaintiff suffered any substantial prejudice by the failure to paint them.

With reference to the cleaning of the demised premises, the evidence discloses that portions of them had previously been used for turkey raising, and that their manure was scattered both in the cabins and on the ground. The defense testimony was to the effect that defendant, his wife and daughter, had spent many days in washing and cleaning the premises and that they were fully cleaned.

By the terms of the lease it was further agreed that defendant was to operate the business on the demised premises under the name of "Caswell Station" and would not use any other name in connection therewith. Plaintiff claims a breach of this provision of the lease, in that defendant painted a sign on the cafe building some twelve to fifteen feet long and in letters about two feet high with the words "Half-way House." The evidence shows, however, that at all the times in question a big thirty feet long sign was maintained on the front of the hotel building with the words "Caswell Station" thereon and that another sign ten feet in length on the front of the garage, which was located on the highway, said "Caswell." Defendant testified that his reason for painting the "Half-way House" sign on the cafe was that so many people inquired as to how far it was from both Bakersfield and Los Angeles, and as the place was about halfway between these cities he put up this sign for their accommodation.

[1] From all the evidence herein we conclude that the trial judge was justified in finding that defendant substantially complied with the terms of the lease with reference to the painting and cleaning of the premises and that the business situate thereon was never operated by defendant under any name but "Caswell Station," the added sign "Half-way House" being of a descriptive and informative character only. The evidence further supports the court's findings to the effect that defendant complied with all the covenants in the lease which he agreed to perform including payment of rentals.

[2] With reference to the point made by plaintiff that the trial court's findings are contradictory, our attention is directed to findings numbered II and III relating to the first cause of action of her complaint. The pertinent portion of such finding II is as follows: "That defendant got full possession of all the demised premises July 15, 1945, and within thirty (30) days thereafter, in accordance with the terms of the lease in paragraph II of the complaint mentioned, cleaned and painted all buildings in the lease described, and cleaned up and placed in order to the satisfaction of plaintiff, the grounds and premises described therein, all at his own cost and expense, which was in lieu and in full payment of the first month's rent from June 18, to July 17, 1945. That on July 18, 1945, defendant paid plaintiff as rent under the said lease $300.00 for the period of July 18 to August 18, 1945." This is followed by finding III: "That all the allegations in paragraph IV are true." As paragraph IV of plaintiff's first cause of action alleges defendant to be indebted to plaintiff for unpaid rentals in the sum of $900 covering the period from May 18, 1945, to August 18, 1945, it is readily apparent that such findings II and III are diametrically opposed. It is equally apparent, both from the evidence, the other findings and the court's conclusions of law, that a mere clerical or stenographic error was committed by omitting the letters "un" as a preface to the word "true" and that finding III should and was intended by the court to read: "That all the allegations in paragraph IV are *un*true." It is a well established rule that a judgment should not be reversed or a new trial ordered for what so clearly appears to be a mere clerical error. See Cummings v. Columbia Pictures Corporation, 1935, 8 Cal.App.2d 244, 250, 47 P.2d 504, and cases there cited.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

77 Cal.App.2d 449

COX v. KAUFMAN et al.

Civ. 13119.

District Court of Appeal, First District, Division 2, California.

Dec. 30, 1946.

1. Husband and wife ⚷254

An automobile purchased with community funds is "community property" of spouses, notwithstanding registration of automobile in husband's name. Civ.Code, §§ 161a, 172, 172a.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

2. Husband and wife ⚷265

A husband had the same power of management and control of community property after enactment of statute defining respective interests and rights of spouses in community that he had before enactment of such statute. Civ.Code, §§ 161a, 172, 172a.

3. Automobiles ⚷192(5)

A husband's use of automobile registered in husband's name and which was community property was not under statute with "express or implied consent" of wife so as to make wife liable for injuries sustained by plaintiff in automobile accident in view of husband's absolute right to manage and control community property without regard to wife's consent. Civ.Code, §§ 161a, 172, 172a; Vehicle Code, § 402.

See Words and Phrases, Permanent Edition, for all other definitions of "Express or Implied Consent".

4. Principal and agent ⚷1

The primary test of agency is the right of control.

5. Automobiles ⚷192(5)

The fact that husband was driving wife to work in automobile registered in husband's name and purchased with community funds did not make husband the wife's agent in driving the automobile and did not constitute a right of control of automobile in wife, so as to impose liability on wife for injuries sustained by plaintiff in automobile accident. Civ.Code, §§ 161a, 172, 172a; Vehicle Code, § 402.

6. Automobiles ⚷192(5)

The right of husband who was present with wife in automobile purchased with community funds, to manage and control such community property was exclusive, and wife had no right of management or control, and statute making one liable for his want of ordinary care or skill in management of his property did not aid plaintiff seeking to impose liability on wife for injuries sustained in accident while husband was driving automobile. Civ.Code, §§ 161a, 172, 172a, 1714; Vehicle Code, § 402.

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action for injuries sustained in automobile accident by Griffith Cox against Charles Kaufman, Ida Kaufman and Leontine Sheehy. From a judgment of nonsuit entered in favor of defendant Ida Kaufman at the close of the plaintiff's case, the plaintiff appeals.

Affirmed.

Earl C. Berger, of San Francisco, for appellant.

Crist & Beene, of Palo Alto, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit entered in favor of defendant Ida Kaufman at the close of the plaintiff's case.

Defendants Charles Kaufman and Ida Kaufman are husband and wife. At the time of the injuries to plaintiff the Kaufmans were both employed by the same employer. On certain days of the week Mrs. Kaufman's employment commenced at an earlier hour than that of her husband and on such days Mr. Kaufman was in the habit of driving Mrs. Kaufman to their common place of employment. On such occasions they made only one trip and Mr. Kaufman would remain at their place of employment until his hours of employment commenced. The morning when the car driven by Mr. Kaufman struck and injured plaintiff was one of those on which Mrs. Kaufman was required to begin her work at an earlier hour than her husband, and Mr. Kaufman was taking his wife to their place of employment at the time. It was stipulated that the automobile which Mr. Kaufman was driving had been purchased by him with community funds and that the car was registered in the name of Mr. Kaufman as owner.

[1] Although registered in Mr. Kaufman's name the automobile, having been purchased with community funds, was the community property of the spouses. 3 Cal. Jur.Supp. 521. Under section 161a, of the Civil Code the wife now has a "present, existing and equal" interest in the community property. Section 402 of the Vehicle Code imposes a liability upon the owner of an automobile for the negligence of any person using or operating it with the owner's consent, express or implied, and appellant argues that because of Mrs. Kaufman's community interest in the automobile she is an owner within the meaning of this section of the Vehicle Code. This may be conceded but the question still remains whether under our law a husband using or operating an automobile which is community property may be said to be doing so with the express or implied consent of his wife to as to make her liable under Vehicle Code, sec. 402.

Civil Code, sec. 161a reads: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Sec. 172, Civil Code, therein referred to, provides: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

[2] The effect of these sections is to continue in the husband the same power of management and control of the community property that he had before the enactment of sec. 161a, Civil Code. 3 Cal.Jur.Supp. 608; Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641. In Grolemund v. Cafferata, 17 Cal.2d at page 684, 111 P.2d at page 643, the court said: "That the addition in 1927 of section 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property is manifest by the express recognition accorded sections 172 and 172a in the later statute."

[3] Having the entire management and control of the community property "as he has of his separate estate" (Civ.Code, sec. 172), no consent of the wife, express or implied, to her husband's use or operation of the community automobile could add anything as a matter of law or of fact to his rights in that respect, which are already plenary and complete. Under secs. 161a and 172, Civ.Code, her objection to his use of the automobile would be as futile as her consent to his use of it would be superfluous. His operation of the car in contemplation of law is referable to his absolute right to manage and control the community property and not to any consent, express or implied, of his wife; and sec. 402, Vehicle Code, for that reason has no application to the facts of this case.

[4, 5] Appellant further argues that since the trip was in Mrs. Kaufman's car and for her benefit the jury might have inferred that Mr. Kaufman was her agent in driving the car. The primary test of agency is the right of control. No facts were proved in this case to support an inference that Mrs. Kaufman had any right to control her husband in the operation of the community automobile. Under secs. 161a and 172 the right to manage and control the car was vested exclusively in him.

The fact that he was transporting her to her work cannot support an inference that he yielded this right of control to her. In this respect she was no different from a stranger who might have been accommodated by the husband in the same way. Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747 is markedly different on its facts. There the husband was driving his wife's car *(which was her separate property)* on his wife's business at the time of the injury on which the action was grounded, and it was on these facts that the court held an inference of agency to be justified.

[6] Section 1714, making one liable for his "want of ordinary care or skill in the management of his property", cannot help appellant because while the husband is present his right to manage and control the community property is exclusive and the wife has no right of management or control.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

77 Cal.App.2d 316

DEPARTMENT OF SOCIAL WELFARE v. WINGO.

Civ. 3432.

District Court of Appeal, Fourth District, California.

Dec. 18, 1946.

1. Statutes 🔑179

When meaning to be given to particular terms is prescribed by Legislature in enacting a statute, such meaning is binding upon the courts.

2. Paupers 🔑40

Under Old Age Security Law, providing that double the amount of aid paid in excess of that to which recipient was legally entitled "may" be recovered by Department of Social Welfare from recipient's estate, "may" is permissive and does not mean "must". Welfare and Institutions Code, §§ 15, 2223.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

3. Statutes 🔑270, 276(1), 277

Where cause of action unknown at common law has been created by statute and no vested or contractual rights have arisen under it, repeal of statute without saving clause before judgment becomes final destroys the right of action, and same rule applies to amendment of a statute.

4. Constitutional law 🔑104

A person can have no vested right in an unenforced statutory penalty or forfeiture.

5. Statutes 🔑264, 276(2)

The repeal of a statute creating a penalty running either to an individual or to the state at any time before final judgment extinguishes the right to recover the penalty, and the same rule applies to remedial statutes unknown to the common law.

6. Statutes 🔑276(1), 277

The Legislature may withdraw a statutory right or remedy unknown to the common law, and the repeal of such statute without a saving clause will terminate all pending actions based thereon.

7. Paupers 🔑40

In action by Department of Social Welfare against old age aid recipient's executors to recover amount paid to recipient, the statute reducing penalty that might be imposed where aid, to which recipient is not entitled, is obtained in good faith, which statute was not in effect when aid was received but was in effect during trial, should have been considered by trial judge as an amendment or modification of statute imposing penalty for receiving aid in excess of that to which recipient is entitled. Welfare and Institutions' Code, §§ 2223, 2223.5.

8. Paupers 🔑40

In action by Department of Social Welfare against old age aid recipient's executor to recover amount paid to recipient, evidence established that at most the excess property, which is determined by deducting allowable $500 from total assumed value of personalty, left a variable amount ranging from $549.40 to $761.13 which recipient could have applied to his support, and hence evidence did not sustain judgment for $948 overpayment. Welfare and Institutions Code, §§ 2223, 2223.5.

9. Evidence ⚷89

In action by Department of Social Welfare against old age aid recipient's executor to recover amount paid to recipient, record failed to present sufficient facts to overcome presumption of recipient's innocence of wrong, requiring conclusion that recipient obtained aid in good faith. Welfare and Institutions Code, §§ 2223, 2223.5; Code Civ.Proc. § 1963.

10. Paupers ⚷2, 43(2)

The Old Age Security Law was passed with intent of preventing suffering and want on part of needy aged, and to help furnish them necessities of life so that value of personalty of a recipient of aid should be the amount of money that could be obtained for it, "value" being what the thing will bring today in exploitation or exchange under some presently possible conditions. Welfare and Institutions Code, § 2000 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Value".

11. Paupers ⚷40

In action by Department of Social Welfare against old age aid recipient's executor to recover amount paid to recipient, evidence which had a bearing on good faith of recipient in applying for and receiving aid was improperly excluded. Welfare and Institutions Code, §§ 2223, 2223.5; Code Civ.Proc. § 1963.

* * *

Appeals from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Department of Social Welfare of the State of California against Vernie Wingo, as executor of the estate of F. S. Wingo, deceased, to recover money paid to deceased during his lifetime under the Old Age Security Law. From a judgment for plaintiff, plaintiff and defendant appeal.

Reversed.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for plaintiff.

Alphonse E. Ganahl, of Corona, for defendant.

MARKS, Justice.

Both parties have appealed from a judgment whereby plaintiff recovered $948 paid F. S. Wingo, deceased, during his lifetime, between May 1, 1938, and January 1, 1940, both inclusive, under the Old Age Security Law (Sects. 2000 et seq., Welfare and Institutions Code, hereafter called the Code).

The plaintiff maintains that the judgment should be for double the amount paid deceased under the provisions of section 2223 of the Code, and defendant argues that the evidence is insufficient to support any award against defendant.

Several exhibits were introduced in evidence at the trial. While they are referred to in the briefs they have neither been copied in the record nor have they been transmitted to this court. If counsel do not consider them of sufficient importance to have them before us we see no reason why we should do so. See, Rule 5; Subd. b, Rule 10; Rule 52, Rules on Appeal. We will rely on the statements in the briefs as to the contents of these exhibits.

We will first consider the appeal of the plaintiff where it is contended that it was incumbent on the trial judge to render judgment against defendant for double the amount paid deceased. This argument is based on the theory that the word "may" in section 2223 of the Code must be construed as meaning "must."

Section 2223 of the Code provides as follows:

"If, on the death of a recipient of aid under this chapter, it is found that he was possessed of property or income in excess of the amount allowed under the provisions of this chapter and that he has not disclosed the same to the board of supervisors, double the amount of the aid paid him in excess of that to which he was legally entitled may be recovered by the Department of Social Welfare as a preferred claim from his estate * * *."

[1, 2] Section 15 of the Code provides that " 'Shall' is mandatory and 'may' is permissive." "When the meaning to be given to particular terms is prescribed by the legislature in enacting a statute, that meaning is binding upon the courts." B. P. Schulberg Productions, Ltd., v. California Employment Commission, 66 Cal.App.2d 831, 153 P.2d 404, 406. See also, In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017; Rideaux v. Torgrimson, 12 Cal.2d 633, 86 P.2d 826. These authorities seem to settle this argument so it is unnecessary to review in detail the cases cited by plaintiff.

Although this code section and these cases dispose of this contention of plaintiff, there is another compelling reason why this argument cannot be sustained. Although it was not raised in the trial court and is not stressed in the briefs it is too important to be overlooked especially since the case must be tried again.

Section 2223 of the Code is penal in its nature and provides a penalty to be placed on the estate of a person who has, in effect, concealed some of his assets and obtained aid illegally. This section was enacted in 1937 (Stats. 1937, p. 1185), and has remained substantially in the same form ever since.

Section 2223.5 of the Code was enacted in 1943 (Stats. 1943, p. 1592) after the death of deceased, but before the trial of this case when it was in full force and effect. It provides as follows:

"Notwithstanding the provisions of sections 2222 and 2223, a person who has received aid in good faith, honestly believing himself to be entitled thereto, but who is found to have possessed property in excess of the amount allowed under the provisions of this chapter, shall be considered to have been ineligible for aid only during the period for which the excess property, if it had been applied to his support at the rate of the aid granted to him, would have supported him. In such case the recipient shall repay only the aid he received during such period of ineligibility."

While section 2223.5 did not by its express terms amend section 2223 it cannot be doubted that in effect it was an amendment and modification of that section by reducing the penalty that might be imposed where aid was obtained by a recipient honestly and in good faith.

The important question confronting us is this: Should the provisions of section 2223.5 of the Code which was not in effect when the aid was received by deceased but was in effect during the trial of this case have been considered by the trial judge as an amendment or modification of section 2223 of the Code in effect at the time of trial and establishing the law governing its decision? Under the rules announced by the California courts we believe the answer must be in the affirmative.

[3] It is the general rule here that where a cause of action unknown at the common law has been created by statute and no vested or contractual rights have arisen under it the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action. The same rule is applied to an amendment of a statute. California Employment Commission v. Arrow Mill Co., 45 Cal.App.2d 668, 114 P.2d 727.

[4-6] The law on the question was ably summed up by Mr. Presiding Justice Peters in Lemon v. Los Angeles Terminal Ry. Co., 38 Cal.App.2d 659, at page 669 et seq., 102 P.2d 387, at page 392, as follows:

"In addition, it is our opinion that the repeal in 1937 of the statute of 1880, supra, without a saving clause, and the amendment of section 468 of the Civil Code in the same year, constitute a complete bar to the cause of action here involved. * * * It is true, of course, that the repeal of the statute in 1937 could not affect vested rights. But the rights of appellant were not vested. No person has a vested right in an unenforced statutory penalty or forfeiture. Moss v. Smith, supra [171 Cal.

777, 155 P. 90]; Anderson v. Byrnes, 122 Cal. 272, 54 P. 821. For these reasons it has been held in a long line of cases that the repeal of a statute creating a penalty, running either to an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty The same rule applies to remedial statutes unknown to the common law. (Citing cases). The Supreme Court of this state, in a decision rendered since the filing of the briefs herein, has recently reviewed many of these cases in holding that a right or remedy unknown to the common law and dependent entirely on a statute is extinguished by the repeal of the statute. Southern Service Company, Ltd., v. County of Los Angeles, 15 Cal.2d 1, 97 P.2d 963. The rule is clearly stated, [15 Cal.2d at page 11, 97 P.2d] at page 970, as follows: 'The legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon.' * * * '"If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered."'"

These rules find further support in the following cases: Los Angeles etc. Transp. Co. v. Superior Court, 211 Cal. 411, 295 P. 837; Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252; Southern Service Co., Ltd., v. County of Los Angeles, 15 Cal.2d 1, 97 P.2d 963; International etc. Workers v. Landowitz, 20 Cal. 2d 418, 126 P.2d 609; California Employment Commission v. Arrow Mill Co., supra; and Western etc. Lbr. Co. v. California Employment Commission, 58 Cal.App.2d 403, 137 P.2d 76.

[7] It is clear that section 2223 of the Code created a cause of action unknown to the common law which was penal in its nature and that no right to the penalty had vested when this action was tried. There was no saving clause in the later statute. It follows that the provisions of section 2223 of the Code, as modified and amended by section 2223.5 of the Code, should have governed the trial court in its decision of the case and must govern us here.

Section 2223.5 of the Code provides that in cases where the recipient of aid had acted honestly and in good faith the double penalty could not be imposed. This is an added reason for holding that at the time of trial the provisions of section 2223 of the Code were directory and not mandatory. It follows that the appeal of the plaintiff is without merit.

We must next turn to the appeal of defendant where it is urged, among other things, that there is no evidence to support the finding to the effect that deceased owned and had in his possession personal property and money in excess of $500; that plaintiff had no legal capacity to sue; that the trial court erred in excluding evidence offered to show the good faith of deceased in applying for and receiving aid. The arguments of counsel on the first question center around the value of two promissory notes given deceased by his daughters and sons-in-law. No question is raised concerning his real estate.

Deceased left a will, executed in April, 1938, in which it was provided that:

"I have also loaned money in various amounts to some of my surviving children. Any indebtedness to me on account of such loans remaining unpaid at the time of my death shall either be paid to my executor or shall be charged off against the distributive shares of the child or children so indebted to me."

The evidence of value of the personal property owned by deceased which must be relied upon to support the finding to the effect that deceased possessed personal property of a value of more than $500 is indeed meager. It consists of the inventory and appraisement of the property of deceased, the testimony of Jesse Wells, manager of the Arlington Branch of the Citizens Trust and Savings Bank of Riverside (hereinafter called the bank), and that of Frank Burchfield, County Assessor of Riverside County, as to the assessed value of property assessed to William and Mary Flossie Butcher, husband and wife.

The inventory and appraisement was introduced in evidence without objection so it is before us for consideration. It shows the following personal property:

Money on hand and in bank......	$280.13
Furniture and household goods....	100.00
Promissory note, dated April 29, 1938, made by Wm. and Mary Butcher, payable on demand....	756.00
Promissory note, dated April 28, 1938, made by Hildreth and Clyde Story, payable on demand.......	677.10
Account receivable from H. Wingo	125.00

His personal property was of an appraised value of $1938.23, which is in excess of the amount of $500 permitted to a recipient of aid during the time in question here. Sec. 2163 of the Code, as in effect 1938–1941.

The weakness and unsatisfactory nature of an inventory and appraisement as evidence of value in fixing the fees of an administrator is discussed at length in Estate of Fernandez, 119 Cal. 579, 51 P. 851.

There is no evidence before us as to when money in the sum of $280.13 was acquired or how long deceased had that amount of money prior to his death other than stipulations that on May 1, 1938, he had a bank balance of $68.40; that he had a maximum bank balance of $152.50 that year, and that in 1939 his bank balance ran as follows: $187.50, $189.20, and $191.09. We, therefore, cannot charge deceased with having $280.13 in money during the entire time he received aid.

There is evidence in the record that deceased acquired his household goods and furniture in the middle nineteen twenties and that they had a value of $100, so this sum must be included in our calculations of the value of his personal property. Section 2163.2 of the Code was not passed until 1943 (Stats.1943, p. 1586).

There is no evidence in the record before us concerning H. Wingo, his financial responsibility or the value of his indebtedness to deceased other than the inventory and appraisement. Nor does it appear when the debt was created.

Mary Flossie Butcher was the daughter of deceased and the wife of William Butcher. About 1928, deceased loaned them $1000.00, of which sum they repaid something over two hundred dollars prior to the end of 1931. Thereafter, they paid him nothing because, as they both testified, they could not do it as they did not have the money. When deceased executed his will the indebtedness of his children to him was discussed and it was decided that his daughters with their respective husbands execute notes for the unpaid portion of the debts which had been barred by the statute of limitations so that on distribution of the estate the shares of the distributees could be equalized. In the will it was provided that the debts, if not paid, could be treated as advancements to the two daughters.

Mr. Jesse Wells had been manager of the bank since 1933. He knew Mr. and Mrs. Butcher who had been customers of the bank both as borrowers and depositors. As far as the record discloses he did not know Mr. and Mrs. Story. Mr. Wells testified as an expert on the value of at least the Butcher note, as follows:

"Q. Do you see these two notes—this one executed by William Butcher and Mary F. Butcher, dated April 29, 1938? In your opinion, during the period 1938 and 1939 would you consider that a good note?

* * *

"The Court: Ask him if he knows the value.

"Q. (Miss Palmer) Do you know the value of that note, Mr. Wells? A. Well, I am presuming it is a legal note. I haven't read it through. I would answer it this way: That if Mr. Butcher and Mrs. Butcher at that time had applied for a loan in our bank, I think they would have gotten it.

"The Court: Can't you put it as a direct answer to the question as to whether, in your opinion and knowledge of the facts, you know the value of those notes at that time? Just your opinion? A. My opinion would be yes.

"Q. (Miss Palmer): Yes, as to the full amount? A. Yes."

He further testified that the bank loaned Mr. and Mrs. Butcher $1200 in 1939; that he did not check into their mortgages or other obligations; that later the same year the loan was increased to $3000; that

"Q. As a matter of fact, didn't you know at that particular time he was almost insolvent? A. Apparently, because we took security on that particular note.

"Q. Because he was almost insolvent? A. Well, I won't say that.

"Q. Apparently insolvent? A. Times were rather tight, I think, along about that time.

"Q. Was that a mortgage on cattle? A. Yes.

"Q. The bank took a mortgage on the cattle that Mr. Butcher had? A. Presumably, yes, and horses."

The county assessor of Riverside County testified as to the assessed valuation of the property of Mr. and Mrs. Butcher. He knew nothing about their obligations, secured or unsecured. He testified that the assessed valuations represented about one-half of the actual value of their properties. He gave the following assessed valuations, first appearing the year, second the assessed value of the real estate, and third, the assessed value of the personal property: 1938, $4430, $410; 1939, $5330, $940; 1940, $5170, $340.

Mr. Butcher testified that he was a farmer; that the last money paid deceased was in 1931; that thereafter he paid nothing because "I didn't have the money"; that both his real estate and personal property were mortgaged. Mrs. Butcher corroborated her husband. She further testified that at all times after May, 1938, she and her husband were in debt, not considering their note to deceased as a debt; that they could not pay the note to deceased; that she and her husband were on the point of insolvency during the period involved here; that some of the interest accruing during that time had not been paid at the time of trial, February 11, 1944.

The debt of Mr. and Mrs. Story to deceased was created in 1928, and their note was executed in April, 1938. There was no evidence as to the assets and total liabilities of Mr. and Mrs. Story and no evidence except their own on the question of their ability to pay their note.

Mrs. Story testified that in 1938 she and her husband owed about $5500 other than the note to deceased; that their property was mortgaged; that they still were in debt in 1944; that they could not pay their note to deceased. Mr. Story corroborated the testimony of his wife. He added that in 1938 their financial condition "was pretty bad. I was behind on my taxes, and practically through"; that he was a farmer and could pay deceased nothing on the note.

It should be noted here that the foregoing evidence of Mr. and Mrs. Story stands uncontradicted and that plaintiff made no effort to prove that they were able to pay their note to deceased before his death or that they had any assets that could be subjected to that purpose.

Thus the only evidence as to the value of the two notes is the very uncertain testimony of Mr. Wells, that of the assessor as to the assessed valuation of the Butchers' property, and the inventory and appraisement. If the testimony of Mr. Wells can be construed as meaning that the Story note was worth its face value, it is too unsubstantial to create a conflict in the evidence. As we have already observed, it does not appear that he either knew Mr. and Mrs. Story or had any knowledge of their financial condition. Such an expressed opinion (if he intended to express one as to Mr. and Mrs. Story, which is very doubtful) becomes mere speculation without anything on which to base it.

Too much weight cannot be given to the values given the notes in the inventory and appraisement under the circumstances here shown. The will provided that the notes could either be collected or treated as advancements to the two daughters. Thus, regardless of their value and collectibility during the lifetime of deceased, they became a full face value to the estate at the moment of death. If not paid in money, the total sums would be collected by charging them as advancements against the distributive shares of the daughters in the estate. Under these circumstances, it was proper to appraise the notes at full value, and such an appraisement can throw little light on the value of the notes during the lifetime of deceased, which is the controlling question here.

[8] To sum up, we must reject the Story note from consideration as an asset

of deceased, as there is no substantial evidence that it had any value prior to his death. Giving to the balance of the personal property the full value contended for by plaintiff, even including the very questionable H. Wingo debt, we have the following:

Furniture and household goods...	$100.00
Butcher note	756.00
Accounts receivable from H. Wingo	125.00
	$981.00

To this must be added an amount of money which varied from $68.40 on May 1, 1938, to $280.13 at the time of death, as shown in the inventory and appraisement. This would show a variable value of personal property ranging from $1049.40 to $1261.13. This is assuming that the H. Wingo accounts receivable were unpaid on May 1, 1938, and were collectible, which the evidence fails to show. Section 2223.5 of the Code provides that, assuming good faith and honesty of deceased, he would be considered to have been ineligible for aid during the period for which the *excess property,* if applied to his support, would have supported him. This *excess property* is determined by deducting the allowable $500 from the total assumed value of the personal property which leaves a variable amount ranging from a minimum of $549.40 to a maximum of $761.13, which could have been applied to support. This is assuming but not holding that all contentions of plaintiff are correct and find sufficient evidentiary support except as to the Story note. These sums are less than the $948 overpayment found by the trial court, for which judgment was rendered.

[9] As to the question of the honesty and good faith of deceased, the record fails to present sufficient facts to overcome the presumptions of innocence of crime or wrong set forth in section 1963 of the Code of Civil Procedure.

[10] The Old Age Security Law was passed with the benevolent intent of preventing suffering and want on the part of the needy aged, and to help furnish them the necessaries of life such as food, clothing and shelter. These things usually are not subject to barter, so the value of the personal property of a recipient of aid should be the amount of money that could be obtained for it. In Babbitt v. Read, 2 Cir., 236 F. 42, 47, the term was defined as follows: "'Value' is what the thing will bring today in exploitation or exchange under some presently possible conditions."

While the fact that the makers of a promissory note could not pay it at any particular time may be an important element of proof of its value, such evidence of itself does not conclusively establish that the note had no value. The financial condition of the makers might change so that a purchaser of the securities might be found. If a note was not collectible, as appears to be true in the case of the two notes involved here, it might be endorsed by the payee without recourse and sold at a discount. If this could be done, it would be one way of establishing the value of the note. This should be borne in mind on a retrial of the case when the market value of the personal property of deceased at various material times should be established by competent evidence.

Defendant argues that plaintiff had no legal capacity to sue. There is no merit in this contention because section 2223 of the Code provides that it may bring the action.

[11] Defendant argues that the trial court erred in excluding evidence offered by him. The record indicates that this evidence had a bearing on the good faith and honesty of deceased in applying for and receiving aid. Therefore it had a material bearing on an issue in the case and should have been admitted.

We have reviewed the other questions argued by defendant and do not consider that they possess sufficient merit to require particular discussion.

It seems clear that the evidence does not support the judgment in its full amount nor does it disclose the proper amount that plaintiff is entitled to recover, if anything.

The judgment is reversed. Defendant will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

77 Cal.App.2d 372

HAMBRICK v. HAMBRICK.

Civ. 13123.

District Court of Appeal, First District,
Division 2, California.
Dec. 20, 1946.

1. Appeal and error 🔑957(1)
Judgment 🔑138(1)

The policy of the law is to have legal controversies tried upon their merits, and, unless it can be determined as a matter of law that a trial court has abused its discretion in setting aside a default of a party and permitting an answer to be filed, appellate court will not reverse such an order.

2. Appeal and error 🔑948

On appeal from order setting aside a default judgment for excusable neglect, burden is upon appellant to make it appear that trial court abused its discretion. Code Civ.Proc. § 473.

3. Divorce 🔑165(5½)

Trial court did not abuse its discretion in granting motion of defendant husband to vacate an interlocutory judgment of divorce on ground of excusable neglect under showing made by defendant husband. Code Civ.Proc. § 473.

4. Appeal and error 🔑959(1)

An appellate court, owing to remedial character of statute providing for setting aside of a default judgment for excusable neglect and policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief. Code Civ.Proc. § 473.

5. Judgment 🔑143(3)

Even where showing under statute providing for setting aside of default judgment for excusable neglect is not strong, or where there is any doubt as to setting aside of a default, such doubt should be resolved in favor of the application. Code Civ.Proc. § 473.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Agnes Hambrick against William A. Hambrick, Jr., for divorce. From an order vacating an interlocutory judgment of divorce on defendant's motion under section 473 of the Code of Civil Procedure, the plaintiff appeals.

Affirmed.

Gladstein, Andersen, Resner, Sawyer & Edises, of San Francisco, for appellant.

Margaret Cofer, of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order vacating an interlocutory judgment of divorce on motion of the defendant made under section 473, Code of Civil Procedure.

On August 6, 1945, appellant sued respondent on the ground of extreme cruelty and on the same day respondent was served with summons and complaint. He failed to appear; his default was entered on August 30 and on that day the case was tried and an interlocutory judgment in appellant's favor was filed.

On October 17 a notice was served on appellant stating that on October 25 respondent would move for an order setting aside the default judgment on the ground that it had been obtained through respondent's "mistake, inadvertence, surprise, excusable neglect, lack of benefit of legal counsel" and inexperience in legal matters.

Respondent's supporting affidavit shows that the summons had been served in the office of appellant's counsel and that a property settlement agreement had been signed in the same office. It shows that respondent had thought he would be entitled to notice of the time and place of trial, and "to be heard by the Court in his own defense"; that although he had been told that if he did not answer "the case would 'go by default,' due to his lack of benefit of legal counsel and to his own inexperience in legal matters, [he] did not understand what was meant by the terms 'answer' and 'default'; that he did not understand that a default judgment would be entered against him without further notice to him." A showing of merits is contained in the same affidavit.

Appellant's counter-affidavit shows that she was without funds to pay counsel; that the motion was not made in good faith or founded on fact; that the respondent has no grounds for divorce against appellant; that respondent was then $175 in arrears, and therefore in no position to ask for relief. Another counter-affidavit, made by appellant's counsel, shows that there were several conferences between the spouses in his law office, culminating in the contract, during which period respondent stated that he would probably consult his attorney, but that no attorney ever communicated with appellant's counsel. It states that the respondent is an educated man and the publisher of a newspaper; that appellant's counsel explained the entire contents of the agreement to respondent, who thoroughly understood the effect of what he was doing, and who expressed his satisfaction with the agreement. It states that on respondent's inquiry whether he would have to go to court, appellant's counsel advised him that he would not unless he wished to; that respondent informed appellant's counsel that he did not wish to contest the action and that he knew he and his wife could not live together in peace and harmony; that respondent knew, and was also advised by appellant's counsel, that in addition to the charge of extreme cruelty there was another charge which could have been alleged, and that respondent tacitly admitted there would be no defense thereto if made. It states further that after the entry of the interlocutory judgment appellant's counsel immediately informed respondent of that fact, and that about the middle of August, and before the entry of judgment, respondent called at the office of appellant's counsel and signed a deed conveying certain property to appellant pursuant to the contract. It concludes with the statement that respondent had been fully advised of his rights and understood everything that occurred.

At the hearing appellant's counsel stated preliminarily that respondent was $175 in arrears; that appellant had no funds wherewith to pay counsel and that $150 should be allowed to enable her to resist the motion. He asked that the hearing be continued until such payments were made, while disclaiming any intent to have respondent adjudged in contempt. The court deferred action on the money matters.

Respondent was not represented by an attorney during the negotiation of the contract, which contract admittedly was drawn by appellant's counsel. Respondent testified that he had thought he would receive notice of the trial, and that he knew nothing about it until three days after judgment. In answer to the question by the court whether he would have contested the divorce, respondent answered, "No, I would not have stopped her from getting a divorce. Q. Would you have contested it? A. I would have—if she wanted a divorce, I would have let her get the divorce, but I would not—I would have defended myself in case any untrue statements were made. After I got to thinking about that amount—if they had said $1,000 a month, why, I would have said yes, I would have said anything, because under the condition I was in then—well, I could not sleep—"

The court reopened the case on condition that respondent pay the $175 arrearage and $100 attorney fee, all of which was paid.

[1] "It is the well-established policy of the law to have legal controversies tried upon their merits, and unless it can be determined as matter of law that a trial court has abused it discretion in setting aside a default of a party and permitting an answer to be filed, the court on appeal will not reverse such an order. The decisions on these points are so numerous and unvarying that it is not necessary to refer to them." Kalson v. Percival, 217 Cal. 568, 569, 20 P.2d 330. See, also, Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; Brill v. Fox, 211 Cal. 739, 743, 744, 297 P. 25; 14 Cal.Jur. pp. 1075, 1076.

Appellant's counsel with commendable frankness at once recognize these rules but contend that the court abused its discretion because the record shows "the real purpose of the motion was not to try the divorce action on its merits, but was to set aside the agreement of property settlement," and they point to the following statement, made by respondent's counsel at the opening of the hearing: "* * * we are making this motion to set aside the default, due to the fact that the defendant is unable to make such payments * * *." This, it must be admitted, had nothing to do with the merits of the motion under section 473, but if, apart from its irrelevancy a proper case was nevertheless made out, the relief should not be denied because of an erroneous statement. See Beard v. Beard, 16 Cal.2d 645, 648, 107 P.2d 385. The fact that a suit is now pending, brought by respondent to rescind the property settlement agreement, indicates that he must have known that such agreement could not be upset or modified or his obligations thereunder diminished by his motion under section 473.

However, the interlocutory judgment contains the provision "that the property settlement entered into between the parties is approved and is deemed incorporated in this decree, and this court reserves jurisdiction to at any and all times enforce the provisions thereof." The fact that such agreement was negotiated and signed in the office of appellant's counsel (between the time of service of summons and the entry of default) without the respondent being represented by his own counsel (see Swart v. Johnson, 48 Cal.App.2d 829, 833, 120 P.2d 699) might have weighed with the court in the exercise of its discretion.

The answer (quoted earlier) to the question whether respondent would have contested the divorce, is claimed by appellant to suffice, by itself, to defeat respondent's motion because (it is argued) it shows that he never intended to contest. While disjointed and difficult to follow, the answer concludes: "I would have said anything, because under the condition I was in then—well, I could not sleep * * *." These concluding words are susceptible of the interpretation that the respondent was at that time somewhat distraught and nervous and, presumably, the judge so concluded. The presumptions are in favor of the court's action. Stub v. Harrison, 35 Cal.App.2d 685, 690, 96 P.2d 979. The weight and effect of this testimony was purely a matter for the judge's judgment and within his discretion. There is nothing in appellant's counter-affidavits or in the record of the hearing to contradict or question this testimony as to respondent's mental or nervous condition at the time in question. Moreover, in his affidavit respondent deposed that he did not know what "default" or "answer" meant.

The counter-affidavit of appellant contains no statement of fact other than that she is without the wherewithal to resist the motion. It states that the motion is not made in good faith or founded on fact, which are merely conclusions. It states that respondent has no ground for divorce against her; he, of course, could have a meritorious defense without such grounds. And it states he is $175 in arrears. The counter-affidavit filed by appellant's counsel has been already summarized. These counter-affidavits, particularly that of appellant's counsel, were for the action of the judge who heard the motion, and it was his function, and is not ours, to decide between them and the affidavit of respondent, in connection with the testimony at the hearing.

[2, 3] Counsel for appellant, as we have seen, concede that in the absence of a clear showing of abuse of discretion an appellate court will not disturb the order. They must concede, also, that the burden of showing such abuse of discretion is on the appellant. Stub v. Harrison, 35 Cal.App.2d 685, 690, 96 P.2d 979. No such showing has been made herein.

Appellant cites Weinberger v. Manning, 50 Cal.App.2d 494, 123 P.2d 531, 534. The facts of that case are totally dissimilar from those in the instant case. The *in*excusable neglect of the defendant there, who moved to set aside a default, was so aggravated as to evoke such language in the opinion as "an attitude of contemptuous disregard for legal process"; "trifling with the courts"; "reprehensible."

[4, 5] As has been said repeatedly: "* * * An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *." 14 Cal.Jur.

1076; see, also Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, supra, and cases cited; Brill v. Fox, 211 Cal. 739, 743, 744, 297 P. 25. Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. 14 Cal.Jur. p. 1076.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

DODDS v. LIBERTY MUT. INS. CO. *

Civ. 15201.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1946.

Rehearing Denied Jan. 21, 1947.

Hearing Granted Feb. 20, 1947.

1. Workmen's compensation 🔑2254

Lien of employer's insurer against judgment recovered by employee against physician for negligent aggravation of industrial injury was limited to amount actually paid by insurer or for which insurer had become liable because of such malpractice, and did not include expenditures by insurer not recovered by employee in damage action, medical expenditures for treatment of ailment wholly disconnected with physician's negligence, or medical expenditures to aid in determining extent of insurer's liability for future medical or disability payments. Labor Code, §§ 3852, 3854–3856.

2. Workmen's compensation 🔑2188, 2245

An employer who pays or becomes obligated to pay compensation for an industrial injury may have his action against third party who is liable in damages for aggravation of such injury, and he may recover from subsequent tort feasor in addition to total compensation and other special damages for which such tort feasor is liable all items of damages to either employer or employee proximately resulting from such injury. Labor Code, §§ 3852, 3854, 3855.

3. Workmen's compensation 🔑2254

Employer suing physician for negligent aggravation of industrial injury for which employer is obligated to pay compensation may not recover money paid for treatment of a condition not connected with the industrial injury or with injuries caused by such malpractice. Labor Code, §§ 3852, 3854–3856.

4. Workmen's compensation 🔑2189, 2191

Employer or insurance carrier having paid or become obligated to pay compensation for industrial injury is invested by doctrine of subrogation with employee's right of action against third persons allegedly responsible for such injury or aggravation thereof.

5. Costs 🔑155

Where attorney renders services of such value as will make available a fund for a class, even though he appeared for only one claimant, his compensation and expenses should be paid from entire fund saved all classes concerned before fund is distributed.

6. Workmen's compensation 🔑2247

Employer suing third person for aggravation of industrial injury for which employer is obligated to pay compensation may deduct from the recovery in addition to sums laid out by employer in payment of special damages, a reasonable attorney's fee to be fixed by the court. Labor Code, § 3854.

7. Workmen's compensation 🔑2252

If injured employee alone sues third person responsible for industrial injury or aggravation thereof for which employer has paid or become obligated to pay compensation, and he fails to recover the full amount of employer's lien, the employer may collect his claim out of the amount recovered by employee as general damages. Labor Code, §§ 3854–3856.

8. Workmen's compensation 🔑2254

Where employer's compensation insurer, having paid employee compensation for loss of earnings and medical care necessitated by industrial accident and physician's negligent aggravation thereof, refused to sue physician or assist in prosecution of action for damages instituted by employee against physician, but filed notice of lien on whatever judgment employee should recover, a reasonable fee for employee's attorneys was chargeable against insurer's lien on such judgment. Labor Code §§ 3852, 3854–3856.

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* Subsequent opinion 183 P.2d 658.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold F. Dodds against a physician to recover damages for an X-ray burn, wherein judgment was entered for plaintiff and, upon motion of Liberty Mutual Insurance Company, an order was entered allowing it a lien against such judgment. From the order granting such lien and from orders denying plaintiff's motions to set it aside and reopen the application for a lien and from an order denying his motion for allowance of counsel fees to his attorneys, plaintiff appeals.

Order granting a lien modified and as modified affirmed, and order denying application for attorneys' fees reversed.

Hahn & Ross and Philip W. Silver, all of Los Angeles, for plaintiff and appellant.

MOORE, Presiding Justice.

This is an appeal from two orders made in ancillary proceedings in the above entitled matter which will be referred to herein as the "damage action." A judgment of affirmance in the latter cause has this day been filed, appeal number 15,220, 175 P.2d 607, to which reference is made for a knowledge of such facts as are not fully stated herein.

Prior to receiving an X-ray burn through the negligence of defendant, plaintiff was a workman at the yards of the California Shipbuilding Corporation where he received his original injury. Upon his suffering an industrial injury his employer became liable for such sums as might be awarded by the Industrial Accident Commission according to law applicable in such cases, and the Liberty Mutual Insurance Company, herein referred to as Liberty, became liable as the insurance carrier for the employer.

On February 28, 1945, Liberty served upon plaintiff a notice of claim of a lien in the sum of $4,494.81 claiming to be entitled to lien "by reason of an award made by the Industrial Accident Commission on November 28, 1944, * * * in favor of Harold Dodds and against the said Liberty Mutual Insurance Company as insurance carrier for the * * * California Shipbuilding Corporation." On April 11, 1945, judgment was entered in the damage action in the sum of $14,942.05, based upon a verdict which had awarded $10,000 general damages and $4,942.05 special damages. June 12, 1945, Liberty served and filed its notice of motion for order allowing to it a lien against the judgment of plaintiff in the sum of $4,494.81, paid out as insurance by reason of the injuries sustained by plaintiff arising out of his employment and pursuant to the award of the Industrial Accident Commission on November 28, 1944, in accordance with the provisions of the Labor Code.

On June 18, 1945, plaintiff served and filed his notice of motion for an order allowing counsel fees to his attorneys "on that part of the judgment heretofore entered * * * upon which Liberty * * * is granted a lien * * * on the ground that the above entitled action was a representative suit brought by the plaintiff on his own behalf and on behalf of the Liberty * * * to obtain a common fund." June 28, both motions having been argued and submitted, the court made its order allowing Liberty a lien in the sum of $4,494.81, and denied plaintiff's motions for attorneys' fees. July 3, 1945, plaintiff filed two notices of motions: (1) For an order setting aside the order of June 28 on the ground that subsequent to the latter date the Supreme Court had affirmed a judgment in the case of Heaton v. Kerlan, 27 Cal.2d 716, 166 P.2d 857 establishing that a workmen's compensation insurance carrier cannot assert a lien in an action by an employee against a physician for an aggravation of an injury sustained in the course of employment; (2) for an order reopening the application of Liberty for a lien, on the ground that the latter's application "for a lien has failed to segregate and itemize all the moneys claimed to have been expended by them for which they claim a lien."

Both of such motions having been denied, plaintiff has appealed from such denial as well as from the order denying him attorneys' fees and the order granting Liberty a lien.

Plaintiff now contends that the trial court erred in allowing Liberty a lien for any sum in excess of $3,668.08. He asserts that it was error to include in such lien any sums expended by Liberty which were not recovered by plaintiff in the damage action, or medical expenditures for the treatment of ailments wholly disconnected with the injuries sustained by a person as a result of the acts of defendant Stellar, or medical expenses paid by Liberty solely for its benefit to aid it in determining the extent of its liability for future medical or disability payments.

[1] Plaintiff's contention appears to be well founded. Included in the lien are (1) moneys paid to a medical examiner appointed by the Industrial Accident Commission to determine the extent of plaintiff's continued disability, (2) payments made to Doctor Burke for treating a low back pain, (3) $75.72 paid by Liberty for telephone calls and guest trays, (4) hospital bills from March 25 to April 12, 1943, recovery of which was denied by the court in the damage action, and (5) payments made by Liberty to other physicians for advice as to any liability it owed plaintiff for his injury. The foregoing items total $823.01 and in any view of the matter do not constitute a lien upon plaintiff's judgment.

[2] An employer who pays or becomes obligated to pay compensation for an industrial injury may have his action against a third party who is liable in damages for the aggravation of such injury, and he may recover from the subsequent tort feasor in addition to the total compensation and other special damages for which such tort feasor is liable all items of damages to either employer or employee proximately resulting from such injury. Labor Code, sections 3852, 3854, 3855; State Compensation Ins. Fund v. Matulich, 55 Cal.App.2d 528, 531, 131 P.2d 21. Where the employee makes recovery from the person who has aggravated his industrial injury he shall first apply out of the entire amount of any judgment for any damage recovered a sufficient amount to reimburse the employer for his expenditures and compensation which the court shall allow as a first lien against the entire amount of any judgment for any damages recovered by the employee. Labor Code, sec. 3856.

[3, 4] While the Labor Code thus authorizes the employer to recover the amount of his obligation to his employee from the third party in addition to the total amount of compensation, yet he cannot recover against a doctor for alleged malpractice the moneys paid for treatment of a condition not appearing to be connected with the industrial injury (Hartford Accident & Indemnity Co. v. Sprague, 6 Cal. App.2d 61, 44 P.2d 361), or with the injuries caused by such malpractice. In an action by an employee such as the one at bar the employer's lien is limited to the amount actually paid by him or for which he has become liable because of the malpractice. Heaton v. Kerlan, supra. The employer or his insurance carrier is invested by the doctrine of subrogation with the right of action of the employee. Eckman v. Arnold Taxi Co., 64 Cal.App.2d 229, 234, 148 P.2d 677; American Mutual Ins. Co. v. Otis, 23 S.W.2d 245.

In view of the foregoing the order awarding Liberty a lien in the sum of $4,494.81 should be modified by deducting therefrom the sum of $823.01.

After judgment had been entered in the damage action plaintiff applied to the court for an order that out of the portion for which Liberty would be allowed a lien upon the judgment a reasonable fee should be paid to plaintiff's counsel. His motion was based upon the ground that the damage action was a representative suit prosecuted on behalf of plaintiff for the damages he had suffered by reason of the malpractice of defendant's agent. The supporting affidavit avers that the Industrial Accident Commission had awarded plaintiff a judgment against his employer and Liberty as its insurance carrier for loss of earnings and medical care made necessary by the original injury and the aggravation thereof by defendant's agent; that as a result of such award Liberty had paid plaintiff $4,094.81 for compensation and medical care, and that in the damage action plaintiff had recovered $4,942.05 as his special damages including his loss of earnings; that Liberty had refused to file an independent action against defendant Stellar for the sums it had paid to plaintiff pursuant to the Commission's award but had filed notice of its claim of lien upon such judgment as plaintiff might obtain; that Liberty had rendered no services to plaintiff or to any of his agents or counsel in the prosecution of the damage action to recover the amounts Liberty had paid for loss of earnings, medical and hospital expenses, but that plaintiff's counsel had subpoenaed the witnesses and introduced the proof of such outlays of Liberty without its assistance in any respect. The affidavit further recites the nine days' duration of the trial, the judgment, the motion for a new trial, the voluminous brief (150 pages) of defendant's counsel, the study thereof, the reply thereto, and the argument; that $300 had been paid for expert fees and for the reporter's transcript not taxable as costs; that recovery was had solely by virtue of the legal services of plaintiff's counsel and that Liberty had benefited by the judgment in that its lien will be paid, whereas it would have no value but for the services of plaintiff's counsel; that during the pendency of the damage action Liberty gave notice of its intention to assert a lien upon the judgment and to demand payment thereof; that plaintiff has agreed to pay his own counsel 30 per cent of recovery for the prosecution of the damage action; that it would be equitable to order Liberty to pay plaintiff's counsel for all legal services rendered by them in recovering the sums expended by Liberty a sum equivalent to 30 per cent of the amount of Liberty's lien, and that the court should reserve jurisdiction to allow additional counsel fees for services in the event of appeal.

Liberty filed no counteraffidavit, and on this appeal has filed no brief.

[5-8] It is a rule of ancient origin and long enforced in chancery that where a lawyer has rendered services of such value as will make available a fund for a class, even though he appeared for only one claimant, "it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed." Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, 277, 153 P.2d 714; Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591. By section 3854 of the Labor Code the employer may prosecute an action to recover for the aggravation of an industrial injury of his employee, and from the recovery he may deduct not only the sums he may have laid out in payment of special damages but also a reasonable attorney's fee to be fixed by the court. The latter provision is nothing more than a statutory enactment of the doctrine upheld by the last mentioned authorities and does not enlarge the employer's right in equity to attorneys' fees out of the amount recovered. But if the employer, or his insurance carrier, refrains from instituting an action to recoup his losses or refuses to join in a suit by the employee to recover the employer's lien, the employee acts at his peril if he fails to include in his suit the claim of his employer for all loses suffered as a result of the industrial injury or of its aggravation. Should he fail to recover the full amount of the employer's lien the employer may collect his claim out of the amount recovered by the employee as general damages. Labor Code, secs. 3854, 3855, 3856; Heaton v. Kerlan, supra. If the employer may recover counsel fees out of such fund as he might recover from the tort feasor who has aggravated an industrial injury, there is no reason why he should not compensate the attorney of the injured employee for recovering the lien of the employer or of his insurance carrier.

It is therefore ordered (1) that the order granting Liberty a lien in the sum of $4,494.81 be and it is hereby modified by reducing the amount thereof to $3,671.80 and as thus modified it is affirmed; (2) that the order denying plaintiff's application for attorneys' fees be and it is hereby reversed.

McCOMB and WILSON, JJ., concur.

77 Cal.App.2d 294

In re ZARING'S ESTATE.

PERRY et al. v. ZARING.

Civ. 15516.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1946.

New trial ⚷163(1)

An order granting motion for new trial on ground that evidence was insufficient to support jury's verdict and judgment thereon was not erroneous as based on ground not specified in motion, which recited ground that verdict was contrary to evidence. Code Civ.Proc. § 657, subd. 6.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by George R. Perry for restoration of Kate A. Zaring, an incompetent, to capacity, contested by Manson H. Zaring, the incompetent's guardian. Judgment restoring the incompetent to capacity, and from an order granting contestant's motion for a new trial, petitioner and the incompetent appeal.

Affirmed.

Cantillon & Glover, of Los Angeles, for appellants.

Paul Taylor and Joseph D. Taylor, both of Los Angeles, for respondent.

YORK, Presiding Justice.

On June 15, 1945, appellant Perry, as a friend of Kate A. Zaring, an incompetent, filed a petition for the latter's restoration to capacity. After trial by jury, wherein respondent Manson H. Zaring, as guardian of the incompetent, resisted said petition, a verdict was returned finding Kate A. Zaring to be a competent person and judgment on the verdict was duly entered restoring said incompetent to capacity and mental competency. Thereafter respondent guardian moved for a new trial on the grounds: "(1) That the verdict is contrary to the law; (2) That the verdict is contrary to the evidence; (3) That the verdict is contrary to the law and the evidence." Said motion was granted by the trial court "on the ground that the evidence is insufficient to support the verdict and judgment entered thereon."

This appeal is prosecuted by petitioner Perry and the incompetent Zaring on the ground that said order is erroneous, because granted on a ground not specified in respondent guardian's notice of intention to move for a new trial.

Section 657, Code of Civil Procedure, provides that "The verdict may be vacated * * * and a new or further trial granted * * * on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: * * * 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law * * *. When a new trial is granted * * * upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. * * *"

In Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 73, 165 P. 12, where defendant's motion for a new trial "was based on various grounds, including the ground that the verdict was contrary to the evidence, and specifically that there was no evidence of any contract to store the goods in a fireproof warehouse, or of any representations that the same had been or were stored in such warehouse"; it was stated by the court: "'It is only necessary to discover whether any of the grounds are sufficient; for the rule is well settled that the order granting a new trial will be affirmed if it can be justified on any ground made by statute the subject of a motion for a new trial.' Churchill v. Flournoy, 127 Cal. [355], 361, 59 P. [791], 793. It should be added, of course, that such ground must be properly specified in the notice of intention to move for a new trial and in the specifications of error or insufficiency of the evidence in the statement or bill of exceptions on which the motion is heard.

We deem it unnecessary to consider the matter at further length. A perusal of the evidence on the issues above stated shows that it is decidedly and substantially conflicting. Under these circumstances 'the judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting.' Curtiss v. Starr, 85 Cal. 376, 24 P. 806; Condee v. Gyger, 126 Cal. 546, 59 P. 26."

In Gray v. Robinson, 33 Cal.App.2d 177, 180, 181, 184, 91 P.2d 194, 196, it was said: "The reasons given by a trial judge in support of an order which sets forth the ground or grounds on which the motion is granted [are] no concern of this court where adequate grounds are specified in the motion and established by uncontradicted affidavits, and particularly so where the court has failed to specifically exclude in the order for a new trial those specified grounds. After a specification of the grounds, the statement of the reasons of the trial court cannot limit this court's inquiry. (Citing authorities.) * * * In Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124, it was said: 'The proposition of the appellant that this court is limited upon this appeal to a consideration of the grounds specified in the order granting the new trial is untenable. A party has the right to move for a new trial upon any or all of the grounds permitted by the statute; and, if the record on which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record. The action of the court below is limited to granting or refusing a new trial, and, except in those cases in which it is justified in limiting the new trial to one or more designated issues, the effect of an order granting a new trial is to place the cause in the position it held before any trial had been had. * * *. A motion for a new trial is a proceeding in the nature of a new action wherein the statement or bill of exceptions corresponds to the complaint, and the specifications of error to a demurrer thereto, and the action of the trial court in sustaining the motion is to be treated on the same principles. If there be any grounds upon which its action can be upheld, the order will be sustained, irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself.' * * * In analyzing the authorities, we are mindful of and must be guided by the general rule, i.e., that a motion for a new trial is to a large extent addressed to the legal discretion of the court to which the application is made and that its action in granting a new trial is conclusive and will not be disturbed in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. Such discretion is very wide and every presumption is indulged in support of the action of the court in passing upon the motion (Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960) and a stronger showing is required to justify interference with an order granting than one denying a new trial, unless made upon some legal proposition which may be considered in itself; and every presumption is indulged in support of the court in passing upon the motion."

The instant appeal is presented upon the judgment roll alone, making it impossible for this court to pass upon the merits of the motion. However, appellants' claim, that the order is erroneous because granted on a ground not specified in the motion, cannot be sustained for the reason that the ground recited in the motion "that the verdict is contrary to the evidence" is just another way of saying that the evidence is insufficient to justify the verdict (Sec. 657, Code of Civil Procedure, subd. 6).

In Re Estate of Bainbridge, 169 Cal. 166, 169, 146 P. 427, 428, the supreme court stated: "In the determination of a motion for a new trial, the verdict should be set aside if, in the opinion of the trial court, it is not supported by sufficient evidence; and this is equally true whether there be an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed. This is the meaning of the terms 'insufficiency of evidence' (Code Civ.

Proc., sec. 657, subd. 6) and '* * * contrary to * * * evidence' (Pen.Code, sec. 1181, subd. 6)."

Again in Mosekian v. Ginsberg, 122 Cal. App. 774, 777, 10 P.2d 525, 526, it is stated: "With regard to appellants' second point on appeal, section 657, subdivision 6, of the Code of Civil Procedure, also provides that 'insufficiency of the evidence to justify the verdict or other decision' is a ground for a new trial. The term 'insufficiency of the evidence' means either an absence of evidence or that the evidence admitted at the trial is lacking in probative force to establish the proposition of fact to which it is addressed. 20 Cal.Jur., p. 106; In re Estate of Bainbridge, 169 Cal. 166, 170, 146 P. 427."

See, also, Campanella v. Campanella, 204 Cal. 515, 523, 269 P. 433, 436, wherein it is stated: "* * * a verdict unduly excessive is a verdict, in part, at least, unsupported by the evidence. In other words, a deficiency in the evidence must be the basis for every contention that the verdict is excessive or the result of passion or prejudice. In Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 57 P. 774, 775, it is said: 'To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial.' 'Insufficiency of the evidence' means want of evidence as well as 'contrary to the weight of the evidence.' Southern Pac. Land Co. v. Dickerson, 188 Cal. 113, 117, 204 P. 576; In re Estate of Bainbridge, 169 Cal. 166, 146 P. 427."

"The granting of a new trial on the ground that the verdict is against admissions of a party who was called as a witness is a decision that the evidence was insufficient to justify the verdict. Likewise, where the court grants a new trial to the defendant upon the ground that it had erred in denying motions for nonsuit made when the plaintiff's case was rested and after all the evidence was closed, the new trial was practically granted for insufficiency of the evidence. And an order granting a new trial in a personal injury action on the ground of plaintiff's contributory negligence is, in effect, an order granting the motion upon the ground of the insufficiency of the evidence to justify the verdict." (20 Cal. Jur. 109, sec. 69.)

For the reasons stated, the order appealed from is affirmed.

DORAN, and WHITE, JJ., concur.

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77 Cal.App.2d 327

DEAN v. FELD.

Civ. 15360.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1946.

Rehearing Denied Jan. 7, 1947.

Hearing Denied Feb. 13, 1947.

1. Trial 🔑296(4)

In action against motorist for injuries sustained by four year old child when struck by automobile, instruction relating to statute dealing with right of way was not prejudicial error, though superfluous, where court instructed that contributory negligence was not involved. Vehicle Code, § 562.

2. Witnesses 🔑247

In action against motorist for injuries sustained by child when struck by automobile, admission of testimony of child's sister that automobile was "pretty close" when child went out into street, was not error on ground that it was ambiguous, since a witness is not required to testify with that certainty which excludes all doubt from his mind.

3. Evidence 🔑474(8)
Witnesses 🔑247

That which is reasonably descriptive of an automobile in action is proper, and a witness may testify whether automobile was going fast or slow, though unable to testify in miles per hour, and any slight opportunity to observe such speed is sufficient.

4. Evidence ⟹43(1)

It is common knowledge that distance is frequently described by a witness by reference to objects in the court room.

5. Automobiles ⟹245(1)

In action against motorist for injuries sustained by child when struck by automobile, wherein child's sister testified that automobile was "pretty close' when child went out into street, what sister meant by expression "pretty close" was for jury.

6. Appeal and error ⟹1048(6)
Automobiles ⟹243(1)

In action against motorist for injuries sustained by four year old child when struck by automobile, cross-examination of child's mother, if she was in habit of letting child play around sidewalk unattended, was immaterial, but not prejudicially erroneous, where court admonished jury that negligence of child's parents was not an issue.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Susan Dean, by her guardian ad litem, Lawrence Dean, against Irving Jack Feld to recover for injuries sustained by plaintiff when struck by defendant's automobile. From a judgment for the defendant, the plaintiff appeals.

Judgment affirmed.

George Cohn, of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from a judgment for defendant in a damage action for personal injuries.

Susan Dean, a four year old child, was struck by an automobile operated by defendant. The accident occurred in a residential district between 6:30 and 7:00 p.m. on April 4th; the weather was clear. The testimony was conflicting as to the rate of speed the car was travelling; defendant testified to 15 or 18 miles per hour. There were cars parked along the curb. Defendant testified, on examination under section 2055, as follows:

"Q. Now, when was the first time that you knew that there was an accident? A. When I stopped my car.

"Q. When you stopped. When you put your brakes on— A. When I put my brakes on.

"Q. —was the first time you knew that there was? A. That is right.

"Q. What caused you to put your brakes on? A. Well, I heard a little girl scream and I thought I seen something in front of my car, and I stopped the car.

"Q. You heard a little girl scream and you thought you saw something— A. —in front of my car, and I stopped the car.

"Q. Now, by that statement—I don't quite understand you. You thought— A. It happened so fast that I didn't realize that I struck something.

"Q. You thought you saw something in front of your car? A. That is right.

"Q. What did you think you saw? A. Well, I didn't realize at that time. I thought it was something moving in front of the car.

"Q. A human being or a human person or a child or something? A. Maybe so.

"Q. Maybe so? A. Yes.

"Q. In other words, you are not sure about that? A. I wasn't sure at that time.

"Q. When later things happened, that's when you found out? A. That is when I found out.

"Q. When you heard this scream did you know where this scream came from? A. After I stopped the car I got out of the car and seen a girl on the sidewalk about 11 years old, and she screamed and exclaimed that her sister is under the car, and I went in front of the car and I seen the little girl right under my car."

The victim suffered a fractured arm and leg, cuts, abrasions, etc.

[1] It is contended by plaintiff on appeal that the court erred by including in the jury instructions, "on its own motion", section 562 of the Vehicle Code; said provi-

sion pertains to the subject of right of way. It is argued in this connection that inasmuch as contributory negligence of the victim was not involved, said instruction was misleading and prejudicial. However the court had stated to the jury during the trial that, "The negligence of the parents cannot be imputed to the child" and instructed the jury formally that "You are instructed that contributory negligence of plaintiff Susan Dean is not an issue in this case. You are further instructed that a child who is so young as to be wholly unable to apprehend apparent danger and to avoid exposure to it cannot be guilty of contributory negligence, and you are instructed that said Susan Dean at the time of the accident herein was too young to be chargeable with negligence." Although the instruction complained of was superfluous, in the light of the record, it cannot be held to have been prejudicial.

It is also contended that the court's failure to give certain requested instructions was error. Without going into detail, it appears that the court fairly and correctly instructed the jury as to all issues.

It is also urged, quoting from appellant's brief, that "The court erred in permitting Sandra Dean to testify that respondent's car was 'pretty close' to Susan Dean when said Sandra Dean shouted to her to stop.

"Sandra Dean, sister of appellant, and age 11 and a witness on behalf of respondent, whose testimony was taken by deposition by reason of illness, was asked the following question by respondent's attorney:

"Q. When she went out after the doll was the car close to her when you shouted to tell her to stop? A. Pretty close."

"Objection was made by counsel for appellant as to the question and answer on the ground that it called for a conclusion of the witness and was immaterial, irrelevant and ambiguous. The objection was overruled by the Court, and this testimony was read to the jury."

[2-5] It is argued that inasmuch as, "distance in this case was of material import, the same constituted error". The question was not improper on cross-examination, nor was the reply irresponsive. The expression "pretty close" was merely descriptive. "Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witness by whom they have been experienced is the only mode by which they can be presented to a jury." Healy v. Visalia etc. R. Co., 101 Cal. 585, 589, 36 P. 125. "[A witness] is not required to testify with that certainty which excludes all doubt from his mind." People v. Soap, 127 Cal. 408, 59 P. 771, 772. Speed, distance, size, weight and the like are properly described by such comparative expressions. For example, a witness may testify whether a vehicle was going fast or slow, although unable to testify in miles per hour. And slight opportunity to observe such speed is sufficient. Shimoda v. Bundy, 24 Cal.App. 675, 142 P. 109. That which is reasonably descriptive of a car in action is proper. Kramm v. Stockton Elec. R. R. Co., 22 Cal.App. 737, 754, 136 P. 523. It is common knowledge that distance is frequently described by a witness by reference to objects in the court room. What the witness meant, therefore, by the expression, "pretty close", was for the jury to determine. There was no error in the ruling.

[6] Finally, appellant argues that a certain question asked by defendant's counsel on cross-examination of the mother of Susan Dean was prejudicial misconduct. The question was, "Are you in the habit of letting this little 4 year old child play around on the sidewalk unattended?" Although the question was immaterial, in the light of the record, it cannot be held prejudicial. The record reveals nothing extraordinary about the neighborhood that distinguishes it from the type in which children generally play on the sidewalk, and unattended. Common knowledge alone defends parents from any suggestion of negligence in such circumstances. Moreover, the court admonished the jury at the time the question was asked, that the negligence of the parents was not an issue and to disregard the question.

There being no errors in the record, the judgment is affirmed.

YORK, P. J., and **WHITE**, J., concur.

Hearing denied; **CARTER**, J., dissenting.

77 Cal.App.2d 408

PERRIN v. RESLEURE et al.

Civ. 13250.

District Court of Appeal, First District,
Division 2, California.
Dec. 24, 1946.

1. Dismissal and nonsuit 🔑60(2)

Action was properly dismissed for lack of prosecution under mandatory and discretionary provision of statute where action had not been brought for trial for more than five years, in absence of offering valid excuse for delay and of promise of defendant's counsel permitting a continuance. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑60(2)

Where no service of process had been made and no appearance had been filed for more than five years after complaint was filed, action was properly dismissed for lack of prosecution. Code Civ.Proc. § 581a.

3. Dismissal and nonsuit 🔑60(2)

Evidence justified dismissal of action for lack of prosecution on ground of deliberate delays taken for purpose of handicapping defense, where case had not been brought to trial within five years after complaint was filed. Code Civ.Proc. § 583.

4. Dismissal and nonsuit 🔑50

Where excuses for delays of bringing action to trial within five years were not reasonable, defendants were not estopped, by their conduct, to urge dismissal for lack of prosecution. Code Civ.Proc. § 583.

* * *

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Suit by Edward B. Perrin, Jr., against Helen Resleure, individually and as executrix of the estate of Jacques Francois Resleure, also known as J. F. Resleure, deceased, and others. From an order dismissing the action for lack of prosecution, plaintiff appeals.

Affirmed.

William A. White, of San Francisco, for appellant.

L. Walter Vivell, of San Francisco, respondent in pro. per.

Single, Anderson & Dawson, of San Francisco, for respondent L. Walter Vivell.

Ralph McGee, of Jackson, and T. P. Wittschen, of Oakland, for respondent Helen Resleure.

NOURSE, Presiding Justice.

Defendants moved to dismiss this action on several grounds, among which were that the cause had not been brought to trial within five years after complaint filed, and no written stipulation for a continuance had been given; that no summons had been served on the corporation; and that the delay had been deliberate to postpone the trial until after the death of two important witnesses, one of whom was the real party in interest. The plaintiff appeals from the order granting a dismissal as to all defendants.

On September 14, 1940, plaintiff filed suit as a stockholder in the Perrin Properties, Inc. (alleging that Perrin Properties had refused to do so) against the corporation, Helen Resleure individually, and as executrix of the estate of J. F. Resleure, Walter Vivell, and Victor Pinckney. On October 22, 1941, plaintiff filed his first amended complaint against the same defendants. William P. Hubbard and F. Walter French were his attorneys of record. Helen Resleure filed her answer on June 10, 1942. Attorneys Ralph McGee and T. P. Wittschen were attorneys of record for Helen Resleure in both her capacities. Defendant Vivell filed his answer on April 6, 1944. The attorneys of record were Single, Bryant, Cook and Herrington, and L. Walter Vivell in pro. per., and as counsel.

On January 2, 1946, Vivell and Helen Resleure filed separate motions to dismiss on the grounds of lack of prosecution.

Attorney William A. White filed an affidavit in which he stated that plaintiff consulted him in September, 1944, and stated to him that his former attorney

(F. Walter French) was in the armed forces and was unable to act for him. White was then substituted as attorney for plaintiff. White called one of the attorneys for Vivell who orally stipulated that if White would not bring the case to trial no motion to dismiss would be made. White then wrote counsel for Resleure and was told that one of her attorneys was ill and White's letter would have his consideration when he returned to his office. No effort was made by plaintiff to contact any of the other counsel for the respective defendants—all of whom were available throughout the entire period of delay.

Plaintiff filed an affidavit in which he stated that his attorney, French, went into the service, but he did not explain why his other counsel of record was not able to conduct the proceedings. He does not disclose why no effort was made to contact Vivell who was a practicing attorney who appeared both as counsel and in propria persona.

Appellant contends that the courts have recognized that the statute relating to dismissals although mandatory in form should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for the plaintiff to have brought the action to trial. Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 282, 168 P.2d 665; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. This case does not come within the rule of those cited. Here the delay was not caused by any act of the moving parties. There were at all times present and available attorneys for all parties who were able to proceed with the trial or to give written stipulations for continuances. The record does not show that the absence of one of the attorneys for plaintiff, or the sickness of one of the attorneys for one of the respondents prevented the prosecution of the trial within the statutory period.

[1-4] Under section 583 of the Code of Civil Procedure the court may in its discretion dismiss any action which has not been brought to trial within two years. Taking the parties separately the cause was properly dismissed as to respondent Resleure individually and as executrix because no valid excuse was offered for the delay and no promise of counsel either oral or in writing permitted a continuance. As to this respondent, the order of dismissal was proper under both the mandatory and discretionary provisions of section 583, Code of Civil Procedure. As to the Perrin Properties, Inc., and respondent Pinckney, no service of process had been made, and no appearance had been filed for more than five years after the complaint was filed. The action was properly dismissed as to them under the provisions of section 581a, Code of Civil Procedure. Such dismissal is made mandatory by the code section. As to the respondent Vivell, the action was properly dismissed under both the mandatory and discretionary provisions of section 583. The complaint was filed in 1940 attacking on grounds of fraud a transaction of 1934; respondent Vivell filed his answer in April, 1944, represented by himself and four other counsel; one of these five entered the military service from which he returned in 1945 and notified counsel for appellant that no delay in bringing the cause to trial would be agreed to. The trial court could reasonably conclude that these delays were deliberate and taken for the purpose of handicapping the defense to the action. In any event its holding that the excuses were not reasonable disposes of the argument that respondents were estopped by their conduct to urge the dismissal.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.

77 Cal.App.2d 221

In re BEARNS' ESTATE.

BEARNS v. OFFDENKAMP et al.

Civ. 3642.

District Court of Appeal, Fourth District, California.

Dec. 11, 1946.

1. Courts ⚿202(5)

The only orders or judgments in probate proceedings which are appealable are those expressly specified in the Probate Code. Probate Code, § 1240.

2. Wills ⚿358, 384

An order or judgment dismissing a will contest before probate, which order or judgment was made and entered after granting a motion for nonsuit, is not appealable, but is reviewable on appeal from order admitting will to probate. Probate Code, § 1240.

3. Wills ⚿367

Where notice of appeal specified that appeal was taken from the judgment of nonsuit in favor of will proponents and against will contestant and "from the whole thereof," the quoted phrase referred to judgment of nonsuit, which was not appealable, and could not be construed as encompassing order entered the same day admitting will to probate, which was appealable. Probate Code, § 1240.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the estate of Mattie Bearns, deceased, on the petition of Mary Offdenkamp and Martha Welcome for the probate of decedent's will, contested before probate by Bert Bearns. From a judgment dismissing the contest after a motion for nonsuit had been granted, contestant appeals. On proponents' motion to dismiss the appeal.

Appeal dismissed.

George A. Malette and Robert L. Barbour, both of San Diego, for appellant.

Wright, Thomas, Dorman & Fox, by Gerald C. Thomas and Jasper J. Barrett, all of San Diego, for respondents.

MARKS, Justice.

This is a motion to dismiss an appeal from a judgment dismissing a contest to the probate of a will before its admission to probate, after a motion for nonsuit had been granted.

Mattie Bearns died testate in San Diego County on May 25, 1945. A petition to probate her will was filed by the two friends of deceased who were named as executrices and sole beneficiaries. Contestant, Bert Bearns, the son of deceased, was disinherited in the will. He filed a contest on various grounds.

At the trial of the contest before a jury, the trial court granted a motion for nonsuit at the close of contestant's case. On June 10, 1946, a formal written judgment of nonsuit dismissing the contest was entered. The will was admitted to probate by an order bearing the same date, and Mary Offdenkamp and Martha Welcome were appointed executrices without bond. They qualified as such and letters testamentary were issued to them on June 10, 1946.

The notice of appeal contains the following:

"You and each of you please take notice that the contestant in the above entitled action hereby appeals to the Supreme Court of the State of California, from the judgment made and entered in the Superior Court of the State of California in and for the County of San Diego on the 10th day of June, 1946, of non-suit, in favor of the proponents and against the said contestant and from the whole thereof."

The motion to dismiss is made on the ground that contestant has attempted to appeal from a non-appealable order.

[1, 2] It is settled in California that the only orders or judgments in probate proceedings which are appealable are those specified in section 1240 of the Probate Code, which contains no provision for an appeal from an order or judgment dismissing a contest to a will before it has been admitted to probate, which order or judgment was made and entered after granting a motion for nonsuit.

In Estate of Patterson, 220 Cal. 370, 31 P.2d 197, the Supreme Court had before it a motion to dismiss an appeal from an order nonsuiting the appellants there in a contest of a will before probate. After citing Estate of Stierlen, 199 Cal. 140, 248 P. 509; Estate of Edelman, 148 Cal. 233, 82 P. 962, 113 Am.St.Rep. 231; and Estate of Rawson, 66 Cal.App. 144, 225 P. 474, as supporting its conclusions, it was said [220 Cal. 370, 31 P.2d 198]:

"In each of the cited cases it was held that the only appealable orders in probate matters were those designated in subdivision 3 of section 963 of the Code of Civil Procedure and that inasmuch as the respective orders appealed from were not so designated, they constituted mere intermediate rulings or orders which were reviewable only upon appeal from the final order or judgment admitting the will to probate.

"This reasoning is applicable to the present inquiry. No provision is made in section 1240 of the Probate Code, the successor to subdivision 3 of section 963, supra, for an appeal from any order affecting or determining a contest *before* probate. This being so, such intermediate order is reviewable only upon appeal from an order admitting the will to probate."

[3] Contestant argues that the words "from the whole thereof," appearing in the notice of appeal, are sufficient to bring all matters decided by the Probate Court on June 10, before the appellate court for review. He cites Meley v. Boulon, 104 Cal. 262, 37 P. 961, as supporting this argument.

A study of the cited case does not lead to the conclusion drawn by contestant but is clearly against it. The words "from the whole thereof," in the notice of appeal here, relate to the judgment previously mentioned, namely, the judgment of nonsuit and from the whole of that judgment, and not any other order or judgment rendered on the same day.

The appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

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77 Cal.App.2d 403

In re PAUL'S ESTATE.

PAUL v. PAUL.

Civ. 15422.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1946.

1. Divorce ⚷326

In probate proceeding wherein second wife of decedent and divorced wife of decedent as guardian of their eldest child each filed petitions for letters of administration, the child represented by her guardian was entitled to collaterally attack foreign divorce judgment, in absence of estoppel. Probate Code, § 422.

2. Divorce ⚷326

When a foreign divorce decree is relied on, and record shows a compliance with foreign law, a presumption of validity arises, and, in absence of a successful attack on ground that foreign court had no jurisdiction, foreign decree will be recognized.

3. Divorce ⚷327

A foreign divorce decree may be collaterally impeached by extrinsic evidence showing that court pronouncing it did not have jurisdiction either of the parties or the subject matter.

4. Divorce ⚷327

A foreign divorce decree may be attacked upon the ground that the foreign court had no jurisdiction because the petitioning party had not established a bona fide domicile.

5. Divorce ⚷62(1)

Jurisdiction to grant a divorce rests on bona fide domicile, and, where neither party is domiciled within state, no divorce can validly be granted and all proceedings as well as the judgment are void.

6. Divorce ⚷327

A divorce decree rendered in one state may be impeached and denied recognition in another state on ground that neither of the parties had domicile at the divorce forum, notwithstanding recital in divorce decree of the jurisdictional fact of domicile or residence.

7. Domicile ⚷4(2)

Generally, acquisition of a new domicile requires actual change of residence accompanied by intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to former place of abode.

8. Divorce ⚷62(6)

Merely abiding in a place for a definite time for a transient purpose, such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is insufficient to constitute a change of domicile.

9. Divorce ⚷327

In probate proceeding wherein petition for letters of administration filed by second wife of decedent was contested by divorced first wife of decedent as guardian of their eldest child on the ground that Nevada divorce judgment obtained by decedent was void because decedent had never established a legal residence in that state, evidence supported findings upon which judgment in favor of second wife was based, that decedent had established a bona fide residence in Nevada and that the Nevada court had jurisdiction.

10. Appeal and error ⚷1011(1)

Where the evidentiary facts relied upon by the appellant for reversal, together with the inferences in her favor therefrom, merely serve to create a conflict in the evidence, trial court's findings cannot be disturbed.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Everett Paul, deceased, wherein Dorothy B. Paul filed her petition for letters of administration, to which written objection was filed by Martha Paul, as guardian of Dolores Paul, a minor, who herself then filed a petition for letters of administration in the estate on her own account. The petitions were ordered consolidated for the purpose of trial. From a judgment appointing Dorothy B. Paul administratrix of the estate and ordering letters of administration to be issued to her, Martha Paul, as guardian of Dolores Paul, appeals.

Affirmed.

Holbrook & Tarr, of Los Angeles, for appellant.

F. T. Leonetti, of Glendale, for respondent.

KINCAID, Justice pro tem.

This appeal is by petitioner Martha Paul, as guardian of Dolores Paul, a minor, from that certain judgment appointing Dorothy B. Paul administratrix of the estate of Everett J. Paul, deceased, and ordering letters of administration to be issued to her.

The undisputed facts are that the decedent, Everett J. Paul, married Martha Paul in 1928 and there are four living minor children the issue of such marriage, Dolores being the eldest. On June 21, 1945, a divorce action was filed in Los Angeles County by Martha against Everett and process therein was served on him June 29, 1945. He owned a one-half interest in the Paul Gear Works in Glendale, California. On July 10, 1945, Martha and Everett, each being represented by legal counsel, entered into a property settlement agreement providing for her and the children's support and for a division of the community property by virtue of which one-half of decedent's interest in the Paul Gear Works was assigned to Martha, each thus retaining a one-fourth share of the whole of such business. Each party to the agreement further, in writing, specifically waived all rights to administer upon the estate of the other after the death of such other. On July 12, 1945, Everett sold his remaining one-fourth interest in his business to Martha and his partner, B. A. Tilton, for a substantial sum which remained due and owing him.

On the same day, July 12, he left Glendale and went to Reno, Nevada. On August 29, 1945, he filed a complaint for divorce in the District Court of the State of Nevada, in and for the county of Washoe, against Martha as defendant. She, with advice of her counsel, then filed her appearance and waiver in said Nevada action whereby she specifically submitted herself to the jurisdiction of such court, consented to the entry of her default and waived notice of trial and all findings. Trial was thereupon had and a judgment of divorce was rendered by the Nevada court granting him a full and immediate divorce from Martha, the property settlement agreement between the parties being filed with and approved by the court. He thereupon, on the same day, August 29, 1945, in Reno, Nevada, married Dorothy Cathcart, hereinafter referred to as Dorothy Paul, whereupon they immediately left Nevada and went to Sacramento, California, thence returning to Glendale, California. Everett was killed in an automobile accident in Los Angeles County on November 5, 1945.

Dorothy filed her petition for letters of administration in the estate of decedent, written objection to which was filed by Martha as guardian of Dolores, a minor. Issues were raised by such objections collaterally attacking the judgment of divorce of the Nevada court upon the grounds that decedent never established a legal residence in that state but that he proceeded to Reno for the purpose of securing a divorce only, and not for the purpose of establishing himself as a resident of the State of Nevada; that any decree of divorce obtained by him in such state was a fraud upon the courts of both Nevada and California; and that such Nevada court was without jurisdiction to enter the judgment of divorce. Dolores, through her mother, as guardian, then filed a petition for letters of administration in said estate on her own account.

The petitions were ordered consolidated for the purpose of trial and after hearing the evidence the trial judge made his findings, in effect as follows: At the time of the death of decedent he was a resident of Los Angeles County, leaving estate consisting of personal property of the value of about $10,000; he died intestate and Dorothy B. Paul is his surviving spouse and his legal wife, their marriage being in full force and effect at the time of his death; Martha, on July 10, 1945, waived any right to administer upon his estate by virtue of her written property settlement agreement with decedent; he was divorced from Martha in Nevada on August 29, 1945, after she had filed her appearance in said action and submitted herself to the jurisdiction of the Washoe County court. It is not true that the marriage between decedent and Martha was never dissolved, that he was not a bona fide resident of Reno, Nevada, at the time of the divorce, nor that he went to Reno solely for the purpose of securing a divorce. It is further untrue that said decree was granted by virtue of any fraud, or such court was without jurisdiction to grant such decree. It is true that decedent was not engaged in business in California after July 14, 1945, he did not maintain a legal residence in such state, nor retain therein any business interests, clothing, or personal effects, during the period of time that he resided in Reno, Nevada. From these facts the court ordered judgment that Dorothy be appointed administratrix and that letters of administration issue to her in said estate.

[1-6] Concededly, Martha, having relinquished her right to administer upon the estate of the decedent by virtue of the terms of the property settlement agreement, is not entitled to letters of administration personally. She may be entitled to them as guardian of and for the eldest child of the decedent if there is no qualified surviving spouse. Prob.Code, sec. 422. In the absence of an estoppel (see Elliott v. Wohlfrom, 1880, 55 Cal. 384; note IV, 140 A.L.R. 922), such heir is entitled, in this proceeding, to collaterally attack the Nevada judgment. Estate of Davis, 1940, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545. As was said in the recent case of Crouch v. Crouch, 1946, 28 Cal.2d 243, 169 P.2d 897, 900: "The rule of decision long followed in this state is that when a foreign divorce decree is relied upon, and the record shows compliance with the foreign law, a presumption of validity arises, and in the absence of a successful attack upon the ground that the foreign court had no jurisdiction, the foreign decree will be recognized here. However, by an equally well settled corollary of the rule, it is always competent to collaterally impeach a decree of divorce rendered in another state by extrinsic evidence showing that the court pronouncing it did not have jurisdiction either of the parties or the subject matter. Thus the decree may always be attacked up-

on the ground that the foreign court had no jurisdiction because the petitioning party had not established a bona fide domicil." And again 28 Cal.2d at page 243, 169 P.2d at page 900: "It is a well established rule that jurisdiction to grant a divorce rests upon bona fide domicil. Where neither party is domiciled within the state, no divorce can validly be granted and all proceedings, as well as the judgment, are void. Stated another way, a decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicil at the divorce forum, and this is true notwithstanding the recital in the decree from the other state of the jurisdictional fact of domicil or residence."

[7, 8] The principal question now before us for consideration is whether the findings of the court in favor of the bona fides of decedent's residence in Washoe County, Nevada, and of the jurisdiction of the district court of such county and state is supported by the evidence, or, as claimed by appellant, such evidence is so inherently improbable as to be legally incapable of supporting the findings. In measuring the evidence to this question, we deem it proper to keep in mind the rule enunciated by the Supreme Court in DeYoung v. DeYoung, 1946, 27 Cal.2d 521, 524, 165 P.2d 457, 458, that: "The acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode. * * * Merely abiding in a place for a definite time for a transient purpose such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is not sufficient."

[9, 10] In support of such findings and judgment there is evidence, in addition to that previously delineated as being undisputed, showing that at the time decedent left Glendale to go to Reno he relinquished his residential hotel room without providing for any return reservation therein or elsewhere in this state. He took all of his personal belongings with him. He told his former partner he was going to look around for a business location out of California and he advised other people that he was entering into business in Reno and would live there. After arriving in Washoe County he telephoned and wrote letters to Dorothy telling her he liked the residential district of Reno, that business possibilities were good and he was looking for a building there. When Dorothy several days before the divorce date, left California and proceeded to Nevada to join him, she took some of her personal effects and had all of the balance shipped to her there. Martha and the former partner Tilton still owed decedent about $7,000 from the sale of his interest in the gear works business. He wanted this money and he and Dorothy returned to Glendale to collect it because, although he had first planned to write for it, he decided that probably he could get it quicker or better if he went there to collect it himself. He said he then would return to Reno and look at the business possibilities. Decedent and Dorothy left part of their belongings in Reno and some two weeks after their return to Glendale decided to and did have such property sent on to them by express. This evidence, when accepted and believed by the trial judge, supports the findings and meets the requirement that, at the time of the acquisition by decedent of his new domicile in Washoe County, Nevada, he actually changed his place of residence to that location with the intention to remain there either permanently or for an indefinite period and that, at all of the times while so residing there, he was without any fixed or certain purpose to return to his former place of abode. The evidentiary facts relied upon by appellant, together with the inferences in her favor therefrom, merely serve to create a conflict in the evidence and under such circumstances the court's findings cannot be disturbed. Baldwin v. Baldwin, 1946, 28 Cal. 2d 406, 170 P.2d 670; DeYoung v. DeYoung, supra, 27 Cal.2d 521, 525, 165 P.2d 457; Plante v. Plante, 1942, 54 Cal. App.2d 318, 322, 128 .2d 787.

The judgment appealed from is affirmed.

DESMOND, P. J., and WOOD, J., concur.

RAYMOND v. BARTLETT et al.

Civ. 15632.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1946.

Hearing Denied Feb. 10, 1947.

1. Municipal corporations 🔑162(3)

Where it was found on sufficient evidence that duties of city clerk of city of the sixth class and of city purchasing agent were not incompatible, city clerk was entitled to receive extra pay for performing the functions of city purchasing agent.

2. Municipal corporations 🔑162(3)

The statute forbidding any officer of a city of the sixth class to be interested in any contract with such city or with any of its officers or in doing any work or furnishing any supplies for use of such city does not prohibit city clerk from acting as city purchasing agent and procuring added pay for such services on the ground that clerk is doing work for use of city, since the word "work" in such statute refers to work normally done for city by contractors. Gen.Laws, Act 5233, § 886.

See Words and Phrases, Permanent Edition, for all other definitions of "Work".

3. Municipal corporations 🔑138

A person is disqualified to discharge the services of a position in a municipal government when he has a personal interest which might interfere with the unbiased discharge of his duty to the public or prevent his exercise of absolute loyalty to best interests of city. Gen.Laws, Act 5233, § 886; Government Code, § 1090.

4. Municipal corporations 🔑162(3)

Where a city official is merely employed to perform other services for city not incidental to his own office and there is no interest adverse to the public body, the statutes designed to disqualify a city employee or elected official when by his acts he would be actually advancing his personal interests or those of another dealing as an independent contractor with city do not apply. Gen.Laws, Act 5233, § 886; Government Code, § 1090.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Suit by Howard P. Raymond against Albert H. Bartlett, city clerk of the city of Torrance, and Harriett Leech, treasurer of the city of Torrance, to enjoin treasurer from paying clerk, and to enjoin clerk from accepting, a monthly salary for services as purchasing agent of city. From an adverse judgment plaintiff appeals.

Affirmed.

Perry G. Briney, of San Pedro, for appellant.

O'Melveny & Myers and Pierce Works, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The plaintiff, as a taxpayer of Torrance, sued to enjoin respondent Leech, city treasurer, from paying respondent Bartlett, city clerk, and Bartlett from accepting a monthly salary of $50 for his services as purchasing agent of the city. From an adverse judgment plaintiff appeals.

For 24 years Bartlett has been the duly elected, qualified and acting city clerk of Torrance and now receives a regular monthly salary of $250 as such clerk. After acting six years as purchasing agent he was by the city council re-employed to fill that position in July, 1944, on a part-time basis and has received compensation for his services in such position in addition to his official salary. Contrary to the allegations of appellant the office of purchasing agent has never been classified by the city's civil service board as a civil service position. The duties performed by Bartlett as purchasing agent are wholly without the scope and range of the duties of the office of city clerk. Neither are the services and functions of the position of employment incompatible with those of his public office. Except when both the office and the position are held by the same person there is no relation between the two. As such purchasing agent Bartlett has never been interested in any contract with the city or with any of its officials in doing work or in buying supplies for the city or its officers. Neither was he ever interested in any contract made by himself or by any body or board of which he was a member within the meaning of the Government Code (sec. 1090) or otherwise. Having found the foregoing facts the court below decreed that Bartlett is entitled to occupy both the office of city clerk and the position of purchasing agent and to draw the salaries provided by law to be paid to the occupant of each.

[1] Despite such findings appellant now presents "only one contention, towit: that section 886 of Act 5233 of Deering's General Laws prohibits Mr. Bartlett from receiving any sums beyond his regular salary as city clerk." Such Act has not the slightest bearing upon appellant's thesis. Section 886 forbids any officer of a city of the sixth class to be interested in any contract with such city or with any of its officers, "Or in doing any work or furnishing any supplies for the use of such city." Not only was it found that the duties of the position are not incompatible with those of city clerk but the claim of inconsistency of the functions of the two offices was not alleged. Confronted now with such finding appellant contends that "since it is merely a job of work * * * for the use of the City of Torrance it is unlawful for Mr. Bartlett to receive extra pay for such work" or to be interested in such work. Such contention is completely answered by Mousseau v. Garey, 200 Cal. 201, 252 P. 324, where it was held that the duties of the county clerk of Imperial County and of the county's purchasing agent were separate and distinct, and that the clerk might do the work and receive the salary of the purchasing agent.

[2, 3] Appellant's attempt to apply section 886 by the argument that Bartlett is interested as the recipient of a salary for "Doing any work * * * for the use of such city" goes wide of its mark. The section was enacted to prevent any city official from profiting by any contract made with the city for the doing of work for or furnishing supplies to such city. That such is a correct interpretation of the statute is borne out by its provision that a wilful violation thereof shall be ground for removal from office and be punished as a misdemeanor. Certainly the legislature would not provide for such ignominious censure of a faithful public servant because the governing body of a city has seen fit for economy's sake to give him a job to do while he is performing the duties of an elective office. Section 886 is both a recognition and an adaptation of the Bibilcal doctrine that "No man can serve two masters." See Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519, 521; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 601, 229 P. 1020; Nielsen v. Richards, 75 Cal.App. 680, 243 P. 697. A person is disqualified to discharge the services of a position in a municipal government when he has a personal interest which might interfere with the unbiased discharge of his duty to the public or prevent his exercise of absolute loyalty and undivided allegiance to the best interests of the city. Miller v. City of Martinez, supra, 28 Cal.App.2d at page 370, 82 P.2d 519; Nielsen v. Richards, supra, 75 Cal. App. at page 691, 243 P. 697.

A city's employee or elected official is disqualified to hold his position or office only when by his acts he would be actually advancing his personal interests or those of another dealing as an independent contractor with the municipality. His acts cannot conceivably prejudice the public entity while he is working solely for it. Illustrations of violations of section 886 and of section 1090, Government Code are: a councilman's voting to authorize a contract with his corporate employer or selling to the city supplies from the company of which he is manager (Stockton Plumbing & Supply Co. v. Wheeler, supra, 68 Cal.App. at page 596, 229 P. 1020; Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 293 P. 145); a councilman's selling lumber to the city (Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am. St.Rep. 31); a street superintendent's renting his surveying outfit to the city (Osburn v. Stone, 170 Cal. 480, 150 P. 367); a supervisor's taking a chattel mortgage on a printing plant which did the county work (Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095); a supervisor's acquiring a printing contract with the county. County of Shasta v. Moody, 90 Cal. App. 519, 265 P. 1032.

[4] If a contract to be made with the state or any arm thereof would if consummated vest an interest in any official who has negotiated it or must authorize or approve it, and such interest is adverse to the public body, then it is forbidden and the official becomes subject to the provisions of section 886, supra, and of section 1090 of the Government Code. But if a city official is merely employed to perform other services for the city not incidental to his own office such statutes do not apply. Further justification of the foregoing conclusion is to be found in the fact that in 37 cities of the sixth class the city clerk is employed to perform the duties of purchasing agent and no claim has ever been asserted that there was a violation of the law.

In view of the advantage enjoyed by the public in assigning to a city clerk the performance of other tasks for a reasonable compensation, the legislative intention to prohibit such assignments by the city's governing body should be clearly indicated by restrictive statutes.

Affirmed.

McCOMB, and WILSON, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

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77 Cal.App.2d 272

HUGHES v. CITY OF TORRANCE et al.

Civ. 15347.

District Court of Appeal, Second District,
Division 2, California.
Dec. 13, 1946.

Rehearing Denied Dec. 31, 1946.
Hearing Denied Feb. 10, 1947.

1. Municipal corporations 🔑225(5)

Contract between city of sixth class and individual for "sale" of all properties of city used in municipal bus service, and providing that city would refrain from carrying on a similar business and that if city elected to establish a similar business, it would repurchase the business from individual, was a "sale" of a public utility within meaning of act dealing with sale of public utilities, and city was required to comply with such act though city might attempt to sell service piecemeal. Gen. Laws, Act 5203.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

2. Municipal corporations 🔑225(5)

Fact that Legislature provided a method whereby a city might dispose of its utilities is a positive inhibition against such alienation by a city except by a faithful compliance by city with statutory provisions relating to sales of public utilities though there is no constitutional requirement for a method whereby a city must sell a public utility in a certain manner. Gen. Laws, Act 5203; Const. art. 11, § 19.

3. States 🔑4

The fact that city sold its busses which had been used by it in municipal bus service, at maximum price under Emergency Price Control Act, did not excuse city from complying with act dealing with the sale and disposal of public utilities, on ground that the Emergency Price Control Act was controlling, since there is no conflict between the Emergency Price Control Act and the Public Utilities Sales Act. Gen. Laws, Act 5203; Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

4. Trial 🔑397(6)

Judgment for plaintiff in action by alleged taxpayer of city against city and city officials to compel them to take certain action in accordance with statute, contained an implied finding that alleged taxpayer was in fact a taxpayer.

5. Appeal and error 🔑907(3)

When an appeal is taken on judgment roll alone, the appellant cannot dispute the fact that competent proof was admitted to prove the facts found.

6. Appeal and error 🔑544(3)

Where record consists solely of clerk's transcript, findings, actual or implied, are conclusively presumed to have been supported by evidence, and proceedings are presumed to have been regular and no reversal can be ordered in absence of a fatal error appearing in the judgment roll.

7. Appeal and error ⟹931(3)

In absence of written findings on appeal on the judgment roll alone it was presumed that trial judge performed his official duty and obtained oral consent of the losing parties to a waiver of such findings. Code Civ.Proc. §§ 632, 1963, subd. 15.

8. Appeal and error ⟹931(3)

Where written findings were waived, it is presumed that every fact necessary to support the judgment was proved and found.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by William J. B. Hughes against the city of Torrance, a municipal corporation of the sixth class and others, to compel defendants to proceed in accordance with law in the disposal of a public utility and to take no further steps to affect a sale of the utility until they first determine that public necessity and interest demanded such sale, and then submit to the qualified voters the proposition of selling the utility. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

John E. McCall and Burke, Hickson, Burke & Marshall, all of Los Angeles, for appellants.

Entenza & Gramer, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question posed by this appeal is whether a contract made by the city of Torrance for the sale of all of its rolling stock and equipment used in the operation of a bus line is (1) void for the want of an authorization of two thirds of the voters voting at a special election called to authorize the sale of such property, and (2) by reason (a) of the failure of the city council to determine that the public interest and necessity demands the sale of such property and (b) of its failure to submit the contract of sale to the voters of the city.

Since 1941 appellant city has operated a bus transportation service within and from its corporate limits. For the conduct of such operations it acquired busses and other vehicles and the necessary shops, garages and mechanical parts for the maintainance of such vehicles, maintained bus depots within its corporate limits and within the city of Los Angeles and employed sufficient manpower for the conduct of its enterprise. On July 24, 1945, by vote of three to two the city council authorized the execution of a contract with one Koors for the sale of "all of the properties of seller now used or useful in the conduct of that certain transportation passenger service conducted by the city of Torrance as the Torrance Municipal Bus Line * * * for a bid price of Sixty five thousand ($65,000) * * * to be paid in cash for said properties in accordance with the provisions of law and the terms and conditions hereinafter set out * * * that said total bid price * * * represents the aggregate of the purchase price * * * the reasonable value thereof of the several items hereby offered to be sold * * *." Koors paid $5,000 outside of escrow and it was provided that $60,000 be paid to the seller upon the presentation to the escrow holder of "a certified copy of a decision issued by the California Railroad Commission * * * granting to the buyer or his assignee a certificate of public convenience and necessity authorizing said buyer or his assignee to operate a transportation business as a passenger stage corporation as defined in Section 2¼ of the Public Utilities Act, Gen. Laws, Act 6386, * * * authorizing the transportation over and along the public highways in the city of Torrance and vicinity * * * which said certificate * * * will authorize the buyer or buyer's assignee to conduct the same or a service similar to said service now being conducted by the Torrance Municipal Bus Line. * * * Seller agrees to refrain from carrying on a similar business within the city of Torrance * * * as long as the buyer conducts a passenger stage service in said area. * * * In the event * * * the seller elects to establish a like or similar business * * * seller will purchase said transportation business from the buyer or his assignee at the reasonable price thereof and in accordance with law."

After the dissenting members of the council had on July 24, 1945, attempted to effect a reconsideration of the action taken in authorizing the execution of the contract, they demanded that the council submit the matter of a sale of the transportation system to a vote of the electors of the city. Inasmuch as the statute requires a two-thirds vote of the counsel either to adopt a resolution to make sale of a public utility or to submit the matter to a vote of the city's electorate, the dissenters failed to effect the latter action by the same vote as that which had authorized the contract. Thereupon respondent as a taxpayer and elector instituted this action "on behalf of himself and the citizens of Torrance to compel appellants to proceed in accordance with law in the disposal of a public utility * * * and to take no further steps to effect a sale of said passenger transportation system, or the busses and equipment thereof, until they first determine that public necessity and interest demand such sale, and then submit to the qualified voters of Torrance the proposition of selling said transportation system and busses and equipment, in the manner provided in said Sale of Public Utilities Act, 5203, Deering's General Laws, pages 1760, 1761, sections 1, 2, 3, 4 and 5; or to show cause why they should not do so."

An alternative writ of mandate having been issued upon the petition of respondent the matter came on for trial on October 29, 1945, before the order to show cause and receivership department, at which time it was stipulated that the facts alleged in the amended petition were true with the exception of the charge of fraud which was waived by respondent. After the introduction of the minutes of certain meetings of the council the matter was submitted for decision. On November 14 judgment awarding a peremptory writ was entered against appellant city and its councilmen "compelling them to proceed only in accordance with law in the disposal of the transportation system, and the busses and equipment thereof belonging to the city of Torrance, towit, in accordance with Act 5203, (Stats.1921, p. 829) Volume 2, page 1760 Deering's General Laws, and to take no further steps under the contract of July 24, 1945, between Charles F. Koors and the City of Torrance until after there has been passed a resolution of two thirds of the legislative branch of the municipal corporation, determining that the public interest and necessity demands that such sale be made, and then after the proposition of selling such public utility has been submitted to the qualified voters of the municipal corporation at an election held for that purpose, in the manner and under the condition set forth in said law, and thereafter only if said Koors is the highest and best bidder therefor."

On November 28 appellants filed their return to the peremptory writ alleging therein that they had taken no further action in connection with the contract with Koors, and at the same time filed their notice of intention to move for a new trial. The motion for a new trial having been denied on December 28, 1945, the matter was transferred to this court by appeal.

Contrary to the contention of appellants the contract was an attempt by a municipality of the sixth class to sell a public utility. By statute municipal corporations are authorized to "acquire, construct, own, operate, or lease any public utility. A public utility, as the term is used herein, is defined to mean the supply of a municipal corporation alone, or together with the inhabitants thereof, or any portion thereof, with water, light, heat, power, transportation of persons or property, means of communication, or promoting the convenience of the public." (Deering's General Laws, Act 5202, p. 1759, Statutes 1911, p. 1394.) Thereafter an Act was adopted whereby a municipal corporation may sell and dispose of any public utility owned by such municipal corporation. Section 2 thereof provides that in order to accomplish such a sale the legislative branch of the city "shall by resolution passed by two-thirds of all its members determine that the public interest and necessity demands that any public utility owned by such city, town or municipal corporation should be sold, it may at any subsequent meeting of such legislative branch by a vote of two-thirds of all its members order the submission of the proposition of selling such public utility to the qualified voters of said city * * * at an election held for that purpose. The ordinance calling for such special election shall recite the object for which the election is to be held and the purpose for which the proceeds of such sale is proposed to be expended, the manner of holding such election and of voting for or against the sale of such public utility * * *." (Act 5203, Sale and Disposal of Public Utilities; Statutes 1921, p. 829.)

Appellants contend that the city's contract with Koors "deals with all the properties now used or useful in the conduct of that certain passenger transportation service conducted by the city of Torrance and does not therefore constitute the sale of a public utility." Such contention apparently is based upon a technical reading of the document which purports to accomplish a sale of only the "physical equipment used in the transportation system." Appellants appear to bolster such contention on another clause of the contract which requires the city to repurchase the rolling stock and equipment of Koors or his assignee in the event the city should at some future time establish a service competitive to the transportation utility then serving the same area.

[1] The suggestion that a public utility was not sold by the contract is not a reasonable construction of the writing. If all of the assets used by the municipality are to be transferred to the purchaser who in turn is to operate a public transportation system within and from the city there will be nothing left to constitute the public utility now known as the Torrance Municipal Bus Line. Of course if the contract had provided for the sale of a negligible number of busses or other equipment it could not be reasonably contended that the sale of a public utility had resulted. But it can hardly be denied that where a city has alienated so much of its equipment used in operating a public transportation business as to destroy its efficacy as such system it then no longer possesses such public utility. Therefore whether Act 5203 defines a public utility in so many words by applying the reason that is exercised in the ordinary affairs of life the conclusion cannot be obviated that a public utility has been sold if at the time of alienating its entire equipment and implements used in operating its utility it agrees to desist from maintaining a similar utility. Merely because the city had no certificate of convenience and necessity to transfer, a sale of its equipment and rolling stock in toto was not rendered thereby any the less a sale of a public utility. A municipality is the only entity exempt from the requirement to obtain such certificate. In making the purchase Koors knew that he was obtaining every item of property used by the Torrance bus line and that he would be required to comply with all laws regulatory of the operation of a public transportation system.

[2] In answer to appellants' argument that there is neither statutory nor constitutional provision forbidding a city to cease furnishing a public transportation service it may be said that the very fact that the legislature provided a method whereby the city might dispose of its utilities is a positive inhibition against such alienation except by a faithful compliance by the city with the statutory provision relating to sales of public utilities. People v. California Fish Company, 166 Cal. 576, 607, 138 P. 79, 37 Am.Jur. 691; City National Bank v. Kiowa, 104 Okl. 161, 230 P. 894, 39 A.L.R. 206, 211, 218. By the contract herein the city agrees that in the event it should at a future date again establish a public transportation system, despite its obligation to refrain from so doing, it will repurchase the equipment then owned by Koors or his assigns. Appellants contend that by virtue of such covenant "the city merely withdraws temporarily from the transportation business reserving the right to reengage in said business at any time it desires." Such a construction is irrational. The reasonable interpretation of the contract is that the city completely removes itself from the field of transportation utilities and depends on Koors or his successor to satisfy the needs of the Torrance public in the matter of bus transportation. A construction that the contract means that the city is "to lease to a private person the

physical equipment used by it in the operation of a municipally owned transportation system" is in utter defiance of the language employed by the contracting parties to evidence their mutual intention.

The following conspicuous terms necessarily reveal the character of the document as one of purchase and sale: (1) "seller hereby offers to sell and buyer hereby offers to buy"; (2) "seller represents * * * service is operated by seller * * *"; (3) "seller * * * and buyer shall join in opening an escrow * * *"; "buyer agrees to deposit"; "$60,000 is to be paid to seller"; "granting to buyer a certificate of public convenience and necessity"; "seller shall execute a bill of sale * * * to vest title to said property in the buyer unincumbered and free * * *"; (4) "seller shall be entitled to all revenues to the date buyer takes possession"; "buyer shall take title"; (6) "* * * in connection with the sale of the properties * * * the seller represents * * * as long as the buyer conducts a passenger stage service * * * and in consideration for the sale and transfer * * * seller will purchase said transportation business from the buyer * * * at the reasonable price thereof"; (7) "buyer agrees * * * to set aside a sum"; (8) during the period from the date "that buyer takes title * * * seller agrees to protect and preserve all of said automotive equipment * * *." The semanticist is hard pressed to ascertain that such words and phrases have any significance other than a definite purpose on the part of Torrance to sell and convey its entire equipment used in operating its public utility.

Appellants contend there is no constitutional requirement that a city in selling a public utility must do so in accordance with the Public Utilities Act. Such contention is founded upon a misconception of the nature of the state's Constitution. The city received its power to operate a public utility from Act 5202, Deering's General Laws, Statutes 1911, p. 1394. The silence of the constitutional provision (Section 19, Art. XI)* as to the manner of conducting such a sale is wholly immaterial. The power of a municipality to own and operate a public utility was provided by an Act of the legislature approved May 1, 1911, whereas the constitutional amendment authorizing cities to operate public utilities was not adopted until October 10, 1911. The power of the legislature to regulate cities and towns is a power inherent in a sovereign state and is within the sphere of proper legislative activities unless clearly inhibited by the Constitution. It follows that the absence from the Constitution of any provision for a method whereby a public utility must be sold is utterly immaterial. The so-called grant of power by section 19 of Article XI was an exotic plant that sprouted in the congenial atmosphere prevalent in a year of many reforms. It was effectually an assumption by its framers that the legislative branch of the state derives its powers from express grants. Such a philosophy is incongruous with the theory of the foundation of the state under the American juridical system. There was no lack of power inherent in the legislature in April 1911, to create the Public Utilities Sales Act incorporated in Act 5202.

The assertion that a city operating a public transportation system might sell one or more busses is not to be gainsaid; but contrary to appellants' contention it is not true that the conversion of all of its rolling stock into trucks or any other chattels would not be forbidden. A city cannot do indirectly that which it is forbidden to do directly. Therefore an attempt to dispose of a public transportation system by selling one bus at a time or by exchanging all of its busses for other property would be disposing of its utility and would be subject to the provisions of section 2 of Act 5203 after municipal authorities had built it up by slow process. The public is invested with complete ownership thereof when built up by slow degrees to the same extent as though the utility had been purchased outright.

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* In part the section reads: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both."

[3] By reason of the provision in the contract that busses and other chattels to be sold to Koors were to be sold at ceiling prices as fixed by the Office of Price Administration, appellants contend that their sale is to be governed by the Emergency Price Control Act, 50 U.S.C.A.Appendix, § 901. It may be conceded that if the city had effected a sale of any used equipment by the Koors contract or any contract under date of July, 1945, the ceiling prices of such articles would have been fixed by the Office of Price Administration. There is no conflict between the Emergency Price Control Act and the Public Utilities Sales Act. The one was federal legislation designed to preserve the national economy; the other is a domestic statute created for the purpose of preserving the general welfare against corrupt or ill-advised disposal of public utilities by the officials of a municipality by requiring the approval of its electorate. It would be calamitous if a statute of such wholesome and far-reaching consequences could be obviated by the mere squidlike performance of shouting the language of any one of the countless federal statutes which when properly applied helps to maintain a tranquil society. The Emergency Price Control Act has no application to the issues concerning the sale of a public utility.

[4-6] Appellants demand a reversal by reason of the failure of the court to make a finding that respondent was a taxpayer and elector of Torrance. Of course the issue as to the plaintiff's status in such an action ordinarily deserves a finding. However, in the instant action such a finding is implied in the judgment. The claim of respondent that it was stipulated in open court that the allegation that respondent is a taxpayer and voter of Torrance is disputed by appellants. The statements in the briefs are in conflict and there is no reporter's transcript. Many words both written and oral were bandied by counsel concerning the matter but all to no avail. The procedure in such situations is clearly established. When an appeal is taken on the judgment roll alone the appellant is in no position to dispute the fact that competent proof was admitted to prove the facts found. Where the judgment roll does not contain written findings the court's determination of the facts supporting the judgment is implied in the judgment. In any event, when the record consists solely of the clerk's transcript no reversal can be ordered in the absence of a fatal error appearing in the judgment roll. The findings, actual or implied, are conclusively presumed to have been supported by the evidence and the proceedings before the trial court are presumed to have been regular. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.2d 5; Estate of Mautner, 38 Cal.App. 2d 521, 522, 101 P.2d 520.

[7, 8] In the absence of written findings it is presumed that the trial judge performed his official duty (Code Civil Proc., sec. 1963, subd. 15) and obtained oral consent of appellants to a waiver of such findings (Code Civil Proc., sec. 632). Where findings are waived it is presumed that every fact necessary to support the judgment was proved and found. Gray v. Gray, 185 Cal. 598, 197 P. 945; Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421. In the instant cause it must be assumed that the proof showed and the court determined that respondent was at the time of filing and prosecuting his action a taxpayer and an elector of Torrance. Bekins Van Lines, Inc., v. Johnson, supra.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

77 Cal.App.2d 350

PEOPLE v. BENENATO et al.

Cr. 1959.

District Court of Appeal, Third District, California.

Dec. 19, 1946.

1. Conspiracy 🔑41

Party to a conspiracy need not be present and personally participate with his co-conspirators in all or in any of the overt acts, but it is sufficient if there is some one act done within the state to effect the object of the conspiracy by one or more of the parties to such agreement. Pen.Code, § 182, subds. 1, 5; § 184.

2. Conspiracy 🔑41

Where a number of persons conspire to commit a crime each is criminally responsible for the acts of his co-conspirators performed in furtherance of the agreed plot.

3. Conspiracy 🔑47

Evidence sustained conviction of conspiracy to procure female to become inmate of house of prostitution. Pen.Code, § 182, subds. 1, 5; § 184.

4. Conspiracy 🔑35

That female did not become an inmate of house of prostitution because of unfavorable medical examination did not prevent conviction of one who had conspired to have such female become inmate of a house of prostitution contrary to the Penal Code. Pen.Code, § 182, subds. 1, 5; § 184.

5. Criminal law 🔑112(3)

Where some of the overt acts were performed by co-conspirators in furtherance of a scheme to procure inmates for house of prostitution in two different counties the superior court of either county had jurisdiction of prosecution for conspiracy. Pen.Code, § 182.

6. Conspiracy 🔑23

The gist of the crime of "conspiracy" under the Penal Code is the unlawful agreement between the conspirators to commit an offense prohibited by the Code accompanied by an overt act in furtherance thereof. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

7. Conspiracy 🔑47

Conspiracy may be established by circumstantial evidence, and proof by direct evidence of an express agreement between the parties is not necessary. Pen.Code, § 182.

8. Conspiracy 🔑44½

An agreement between co-conspirators may be inferred from the action and conduct of the parties in mutually carrying out a common purpose in violation of the Penal Code. Pen.Code, § 182.

9. Criminal law 🔑1043(1)

Where only a general objection was made to evidence and such objection was withdrawn with mere reservation of right to subsequently move to strike out the evidence, which motion was not made, admissibility of the evidence was not saved for review.

10. Conspiracy 🔑43(1)

An indictment which charged that defendants conspired to procure female for house of prostitution was not bad because the word "inmate" was omitted where it also alleged that in order that such female could be placed in house of prostitution defendants caused such female to be medically examined. Pen.Code, §§ 182, 952.

11. Prostitution 🔑1

"Inmate" as used in Penal Code penalizing pandering merely means that the female is induced or encouraged to occupy, live, or abide in house of prostitution. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Inmate".

12. Indictment and information 🔑196(5)

Any uncertainty in indictment was waived by failure to demur thereto.

13. Criminal law 🔑1186(4)

Any defect in indictment charging conspiracy to procure female to become an inmate of a house of prostitution did not result in a miscarriage of justice. Pen. Code, §§ 182, 952, 960.

14. Criminal law ⚷935(1)
Prostitution ⚷4

Evidence sustained conviction of an attempt to commit the crime of pandering, and an order granting the defendant a new trial was error. Gen.Laws, Act 1906; Pen.Code, §§ 31, 1111.

15. Prostitution ⚷1

A defendant's participation in conspiring to commit the crime of pandering made her a principal in the commission of the attempt to commit the offense which was originated by defendant's co-defendants in another county. Gen.Laws, Act 1906; Pen.Code, §§ 31, 781, 792, 1111.

16. Criminal law ⚷44

An attempt to commit a crime is sufficiently established when the intent to commit it is shown and a direct ineffectual act toward its commission is performed.

17. Criminal law ⚷984

Where a defendant has been convicted upon two counts of an indictment for different offenses necessarily including the same elements and based on the same acts or omissions, he may not ordinarily be sentenced on both counts.

18. Criminal law ⚷29

The same act may violate different statutes and thus constitute different offenses punishable under separate statutes and if one offense requires proof of an element different from the other they may not be deemed to constitute the same offense so as to preclude punishment for each, even though both offenses are founded chiefly on the same facts.

19. Criminal law ⚷200(6)

The attempt to commit pandering does not necessarily involve proof of a previous conspiracy to commit pandering although the intent to violate the statute is involved in both offenses, and conviction of one offense cannot become the basis of a plea of former jeopardy as to the other offense although the evidence in support of both charges is largely the same. Pen.Code, § 182; Gen.Laws, Act 1906.

20. Criminal law ⚷1209

The charge of double punishment for two crimes founded on substantially the same evidence in most respects may be avoided by pronouncing sentences to run concurrently.

21. Criminal law ⚷1188

Where defendant was convicted of conspiracy to procure female as inmate of house of prostitution and of attempt to commit pandering and was improperly granted new trial on count charging the second offense, the trial court would be directed to render judgment on the verdict, the sentence on the second count to run concurrently with sentence on the first count. Pen.Code, § 182; Gen.Laws, Act 1906.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Chris B. Benenato and others were convicted of conspiracy to procure a female for a house of prostitution and of an attempt to commit the crime of pandering, and from an order denying motion for new trial on the conspiracy count and from judgment of conviction on such count, the defendant Louise Clark appeals, and from an order granting a new trial to such defendant on the count for an attempt to commit pandering, the State of California appeals.

Judgment and order on conspiracy count affirmed, and order granting new trial on count for an attempt to commit pandering reversed with directions.

Wallace Shepard and Thomas O'Hara, both of Sacramento, for defendant and appellant.

Robert W. Kenny, Att. Gen., and Jas. O. Reavis, Deputy Atty. Gen., for respondent and appellant.

THOMPSON, Justice.

The appellant, Louise Clark, was indicted jointly with the other defendants, under Section 182 of the Penal Code, for conspiracy in Sacramento County, in June, 1945, "to procure one Nina Ezelle, a female, for a house of prostitution." A second count of the indictment charged them with an *attempt* to commit the crime of pandering contrary to the provisions of the Statutes of 1911, page 9, 1 Deering's Gen.Laws, p. 855, Act 1906, by causing, inducing, persuading and encouraging Nina Ezelle "to become an inmate of a house of prostitution." The codefendant, Manuel Strite, was not apprehended or tried. The remaining defendants were jointly tried and convicted on both counts. The appellant, Clark, moved to set aside the indictment for lack of evidence of probable cause. That motion was denied. A jury found all defendants, except Manuel Strite, guilty of both counts of the indictment. Louise Clark moved for a new trial, which was denied as to the first count and granted as to the second count. She appealed from the order denying a new trial on the first count, and from the judgment of conviction of conspiracy as alleged in that count. The State of California appealed from the order granting a new trial as to the second count for an attempt to commit the crime of pandering. The other defendants have not appealed.

We shall first consider the Clark appeal. The appellant contends that: (1) The evidence is insufficient to support the judgment of conviction of conspiracy to procure Nina Ezelle to become an inmate of a house of prostitution; (2) The court erred in receiving certain evidence, and (3) The indictment fails to state a public offense.

From the evidence which is applicable to the offense of which the appellant, Clark, was convicted under the first count, it appears that she had been previously living in Sacramento with the codefendant Chris Benenato in adultery for about two years. He was a cab driver. She claimed to have left him June 10, 1945. She went to Jackson, Amador County, June 28, 1945, and there leased and maintained a house of prostitution called "Jackie's Place". She admitted leaving some of her clothing in Benenato's rooms at Sacramento when she left him, which she said she was unable to carry with her.

Nina Ezelle was fourteen years of age. She lived with her parents at Broderick, near Sacramento. She had been committed to the Detention Home. She frequented cocktail bars, in Sacramento, where she met the defendants, Benenato, Francis and Strite in the month of June. She repeatedly engaged in sexual intercourse with each of them. She was not married to any of them. She was afflicted with gonorrhea. June 29th, Francis took her to Dr. Elvin O. Brown, in Sacramento, where both of them underwent treatment for venereal diseases. He paid $40 for the treatments. Francis urged her to enter a house of prostitution and to engage in the business of prostitution. She consented to do so. Marcella Baccellia, a girl friend of Nina's, testified that they drove in an automobile with the defendants Benenato and Francis to "Stan's Barbecue" in Sacramento the latter part of June, on which occasion she heard Francis talking with Nina about her engaging in prostitution. Both Benenato and Francis knew that the defendant Clark was maintaining a house of prostitution at Jackson. Benenato took Mabel Massmedzu in his automobile from Sacramento to Clark's resort at Jackson the latter part of June. She saw him there at least twice. July 1st, Benenato took Nina in his automobile from Sacramento to Clark's resort in Jackson. They were accompanied by Mabel, a colored girl. They all entered the house, and went with an inmate named Juanita to the kitchen where they met and talked with the defendant Louise Clark about Nina's becoming an inmate of that house of prostitution. Clark told Nina she would have to be examined by a physician, and accompanied her to the office of Dr. Williams, in Jackson, for that purpose. Nina told Clark she had a venereal disease. Dr. Williams confirmed that fact and told her "she couldn't work there". Clark and Nina then left the physician's office and returned to "Jackie's Place". That same day Benenato took Nina back to Sacramento, where she subsequently engaged in prostitution with various men in Benenato's rooms in that city. Clark never saw Nina after she left her place in Jackson. Nina was later returned to the home of her parents in Broderick. After the defendant, Benenato, had been apprehended, Clark read of his arrest in a newspaper and went to Sacramento and visited him in jail. She arranged for the bond upon which he was released from custody, and she procured the attorney who represented both of them at the trial.

The record contains evidence which we may assume warranted the jury in finding that the defendant Clark was guilty of encouraging Nina Ezelle to become an inmate of her house of prostitution in Amador County, contrary to the provisions of Statutes of 1911, page 9, and of attempting to encourage her to enter that house for the purpose of engaging in prostitution. There is a conflict of evidence in that regard. But, with full knowledge of Nina's desire to do so, Clark accompanied her to the doctor's office in Jackson for a physical examination. The jury had a right to assume from that fact, under the circumstances of the case, that if the physician's examination had been favorable Clark would have accepted her as an inmate of her house, although she did state that she would not have done so because she was too young. If Nina's youthfulness was the controlling factor in refusing to accept her, there was no occasion for Clark to take her to a physician for examination.

The statute provides that: "Any person who shall procure a female inmate for a house of prostitution, or * * * persuade or *encourage* a female person to become an inmate of a house of prostitution, or * * * any place in which prostitution is encouraged or allowed within this state, * * * shall be guilty of a felony, to wit: pandering, * * *."

The appellant was charged with conspiracy to commit the crime of pandering, and also with an attempt to commit pandering.

The indictment specifies two overt acts of the appellant, Louise Clark, in furtherance of the alleged conspiracy and the "attempt to commit pandering." Act number four asserts that on July 1st, 1945, "in pursuance of said conspiracy and to effect its object," Louise Clark "did then and there receive the said Nina Ezelle in a house of prostitution," in the County of Amador. Act number five alleges that, on July 1st, 1945, "in pursuance of said conspiracy and to effect its object," she caused Nina Ezelle to be physically examined by a physician "in order that said Nina Ezelle could be placed in said house of prostitution situated in the City of Jackson."

In the present case the appellant was charged with and convicted of the crime of conspiring to commit pandering by enticing and encouraging a female girl to become an inmate in a house of prostitution. Section 182 of the Penal Code provides that the crime of conspiracy is consummated when,

"Two or more persons conspire:

1. To commit any crime;

* * * * * *

5. To commit any act injurious to the public health, *to public morals*, or to pervert or obstruct justice, or the due administration of the laws."

It is not disputed that pandering is injurious to public morals, or that its perpetration may be the subject of a conspiracy to commit the crime prohibited by said statute. Section 184 of the Penal Code provides that: "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

[1-4] It is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts. It is sufficient if there be "Some [one] act, * * * done within this state to effect the object thereof, by one or more of the parties to such agreement." And the cause may be tried in "Any county in which any such act be done." (Sec. 184, Penal Code.) Where a number of persons conspire to commit a crime, each is criminally responsible for the acts of his co-conspirators performed in furtherance of the agreed plot. People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Harper, 25 Cal.2d 862, 871, 156 P.2d 249; People v. Stoddard, 48 Cal.App. 2d 86, 89, 119 P.2d 160. There are facts and circumstances in this case from which the jury was warranted in finding that the appellant conspired with her codefendants to procure females to become inmates of

her house of prostitution in Amador County. It also appears that she conferred with the girl Nina about becoming an inmate of her house, and also performed the overt act of arranging for a medical examination of Nina Ezelle and of accompanying her to the office of a physician in Jackson for the purpose of determining whether the girl had a venereal disease, with the object of receiving her as an inmate of her house if the examination had proved favorable. The fact that the fulfillment of the purpose of the conspiracy was prevented by an unfavorable medical examination, over which the appellant had no control, in no way relieves her from responsibility for the crime of conspiracy to commit pandering (People v. Grubb, 24 Cal.App. 604, 608, 141 P. 1051), or for the separate offense of attempting to commit the crime of pandering.

[5] There is ample evidence of other overt acts performed by the codefendants in Sacramento in furtherance of the conspiracy to induce Nina to become an inmate of the house of prostitution in Jackson, as specifically alleged in the indictment. It satisfactorily appears that Francis induced and persuaded her to engage in prostitution as a business, and the codefendant, Benenato, took her in his automobile from Sacramento to Jackson for that purpose. He was present when that subject was discussed by Clark in the kitchen of her house. Since some of the overt acts were performed in Sacramento by coconspirators in furtherance of the scheme or plan of procuring inmates for the house of prostitution, the Superior Court of Sacramento County had jurisdiction to try the case. Either Sacramento or Amador County had jurisdiction of the cause. Sec. 182, Penal Code; People v. Johansen, 66 Cal.App. 343, 346, 226 P. 634; see, also, People v. Mandell, 35 Cal.App.2d 368, 371, 95 P.2d 704.

There is sufficient evidence of the conspiracy and of the concerted action of the three codefendants, Clark, Benenato and Francis, to procure or encourage Nina to become an inmate of Clark's house of prostitution at Jackson, Amador County. There is no direct evidence that the three defendants had previously conferred together in procuring Nina Ezelle to become an inmate of the Clark house of prostitution. But the jury was warranted in drawing the inference from the facts adduced that they had conspired to procure female inmates for that house of prostitution in violation of the provisions of the statute. They were previously acquainted in Sacramento. Clark knew Francis as a cab driver. She knew that Francis and Benenato "worked together, as cab drivers." Francis became a bartender. Both men knew that Clark had opened and was operating a house of prostitution at Jackson. Both of them had previously visited that house. Clark had lived and cohabited with Benenato in Sacramento for sometime. They were not married. When she left him about the middle of June, she left some of her clothing in his apartment. Both Benenato and Francis had sexual intercourse with Nina before she was taken to Jackson. They were in the automobile together when Francis persuaded her to become an inmate of the house of prostitution. Benenato had previously taken another girl, Mabel Massmedzu in his automobile to Clark's house at Jackson, when she became an inmate of that place. He was present in the kitchen when Clark discussed with Nina the proposition of becoming an inmate of the house, and when arrangements were made by Clark for Nina's examination, for the purpose of receiving her as an inmate. He knew that the only reason Nina did not remain in that house was because the physician found her to be diseased and told her she could not work there. Benenato then took her back to Sacramento in his own automobile and kept her in his rooms for sometime, where she engaged in prostitution. After Benenato's arrest, the appellant went to Sacramento and talked with him in jail. She arranged for his bail bond, and engaged the attorney who represented both of them at the trial. The foregoing facts amply support the verdict and judgment convicting the appellant of the crime of conspiracy as charged in the first count.

[6-8] The gist of the crime of conspiracy, under Section 182 of the Penal Code, is the unlawful agreement between the con-

spirators to commit an offense prohibited by the statute, accompanied by an overt act in furtherance thereof. The conspiracy may be established by circumstantial evidence. People v. Black, 45 Cal.App.2d 87, 113 P.2d 746; 5 Cal.Jur. 497, § 3. It is not necessary to prove by direct evidence the express agreement between the co-conspirators. That agreement may be inferred from the action and conduct of the defendants in mutually carrying out a common purpose in violation of the statute. People v. Montgomery, 47 Cal.App.2d 1, 11, 117 P.2d 437; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Jones, 136 Cal.App. 722, 29 P.2d 902; Underhill's Crim.Ev. p. 1401, § 773. In the Jones case, 136 Cal.App. at page 726, 29 P.2d at page 904 thereof, the court quoted with approval from People v. Burke, 18 Cal.App. 72, 122 P. 435, as follows: "'In proving a conspiracy, it need not be shown that the parties actually came together and agreed to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of the facts and circumstances which, taken together, apparently indicate that they are mere parts of some complete whole.' [Citing authorities.]"

The foregoing authorities are applicable to the facts of the present case. While there is an absence in this case of direct proof of a previous agreement between the appellant and the other codefendants to procure inmates for the Clark house of prostitution, the circumstances adduced sufficiently support the inference that they did so conspire to commit the crime.

[9] The appellant asserts that the court erred in admitting evidence that the codefendants Benenato and Francis had intercourse with Nina in the rooms of Benenato in Sacramento after the girl had been brought back from Amador County. It is asserted that the alleged conspiracy had then terminated and that the evidence was incompetent and prejudicial. We think this contention is without merit for the reasons that the appellant failed to assign any specific ground of objection and the record indicates that the general objection was withdrawn with the mere reservation of a right to subsequently move to strike out the evidence, which motion was not made.

The codefendants, Benenato and Francis, had been separately indicted for statutory rape upon Nina Ezelle. That case was consolidated for trial with the indictment against all defendants for conspiracy to commit the crime of pandering. At the trial it appeared that, pursuant to the alleged conspiracy, Nina was taken to the Clark house of prostitution in Amador County for the purpose of becoming an inmate thereof. She was then taken by Clark to a physician in Jackson for medical examination for that purpose. On account of an unfavorable examination Nina did not become an inmate of the house, but was returned to Sacramento and was thereafter kept in the rooms of Benenato where she engaged in intercourse with those defendants and with other men. At the trial, on examination of the witness Nina Ezelle, the prosecution sought to adduce evidence of those subsequent acts of intercourse. They were, of course, competent against Benenato and Francis on both indictments against them for statutory rape, It was contended they were also competent against the appellant, Clark, on the theory that the alleged conspiracy was continuing in its nature and had not been terminated. We think the record fairly discloses the fact that evidence of those acts was admitted, subject to a motion to strike it from the record upon failure of the prosecution to subsequently adequately connect them with the alleged conspiracy of Clark. The statement of appellant's attorney appears to recognize that fact. He said, "We just want to *reserve the right* to argue it, *to make our motion to strike and argue it.*" The appellant failed to move to strike the evidence from the record. Moreover, the objection to that evidence fails to assign the ground upon which the appellant relied to exclude it. The record in that regard is as follows:

"Q. And what occurred between you and Curly Francis? Mr. Shepard: May it be understood this is objected to as to the defendant Clark? Mr. Mundt: It is the theory of the prosecution that this evidence is part of the general conspiracy; that the conspiracy continued, the charge of conspiracy to commit pandering continued throughout the entire association of these people with this young girl. The Court: Overruled. I think it is admissible. I presume you [the District Attorney] will explain your theory later in that regard? Mr. Mundt: Yes. Mr. Shepard: Well *is it subject to a motion to strike?* The Court: It is admissible under a theory I don't like to express to the jury at this time. If you want me to I will. Mr. Shepard: *We just want to reserve the right* to argue it, *to make our motion to strike and argue it.*"

It is not contended the appellant ever thereafter moved to strike the evidence from the record. Nor did the appellant ask the court to instruct the jury to disregard it, or to limit it in its application to the other codefendants only. Under such circumstances we are of the opinion the appellant waived her objection to that evidence.

It has been frequently held that when evidence is adduced in good faith upon the theory that it is competent, or that it will be properly connected, subject to a motion to strike it from the record, and that motion is not subsequently urged, the appellant may not complain of the erroneous ruling, but is deemed to have waived the objection. People v. Terry, 18 Cal.App.2d 199, 63 P.2d 307; People v. Page, 86 Cal.App. 148, 260 P. 591; People v. Balmain, 16 Cal.App. 28, 32, 116 P. 303. In the Terry case, supra, the rule is stated as follows: "As to appellant's second proposition, the evidence was received over objection subject to a motion to strike. However, since appellant did not make a motion to strike the testimony after it was received, he may not urge in this court that the ruling was erroneous. [Citing authorities.]"

In the present case, we think the appellant's attorney recognized the fact that the evidence was received subject to a motion to strike it from the record, which motion he failed to make. The objection, for that reason, and because no ground for excluding it was stated, was therefore waived. If the prosecution failed to connect that evidence with the charge of a continuing conspiracy, the appellant should have moved to strike it from the record, or at least should have requested the court to instruct the jury that it was admitted but confined in its application to the defendants Benenato and Francis only.

Finally the appellant contends that count one of the indictment fails to state a cause of action for conspiracy to commit the crime of pandering, for the reason that it omits the word "inmate" and merely charges that the defendants conspired "to procure one Nina Ezelle, a female, *for* a house of prostitution." The indictment, however, does further recite as overt act number 5, that the appellant, Clark, in furtherance of the alleged conspiracy, did "cause the said Nina Ezelle to be given a medical examination * * * *in order that said Nina Ezelle could be placed in said house of prostitution.* * * *." The appellant failed to demur to the indictment, although she did move to dismiss it on the sole ground that she had been committed *without probable cause,* which was denied.

[10] We are of the opinion the first count of the indictment sufficiently states a cause of action for conspiracy to commit the crime of pandering as defined by Statutes of 1911, page 9, 1 Deering's Gen.Laws, p. 855, Act 1906, in view of the amendment to Section 952 of the penal Code in 1929. People v. Miller, 2 Cal. 2d 527, 42 P.2d 308, 98 A.L.R. 913. The section last mentioned provides that the charge "Shall be sufficient if it contains *in substance,* a statement that the accused has committed some public offense therein specified." It further declares that the charge "May be in the words of the enactment * * * *or in any words sufficient to give the accused notice of the offense of which he is accused.*" (Italics added.) Certainly the appellant was clearly charged in the first count of the indictment with conspiracy to commit pandering. She was not charged with *procuring* an inmate for a house of prosti-

tution. She was charged with participating in a conspiracy, or a concerted plan to commit the crime of pandering. The statute provides that any person who "By any device or *scheme,* shall cause, induce, persuade *or encourage* a female person to become an inmate of a house of prostitution * * * or as an inmate of any place in which prostitution is encouraged or allowed within this state," shall be guilty of pandering. The indictment clearly charges that appellant conspired to procure the named female "for a house of prostitution." It further specifies that she "caused" the female to be given a medical examination "in order that said Nina Ezelle *could be placed in said house of prostitution."* The statute does not require that a female shall be encouraged to become an inmate *for the purpose of engaging in prostitution,* in order to constitute the crime of pandering. It is sufficient if she is induced or encouraged to become an inmate of a house where other persons engaged in prostitution, or where prostitution is permitted to be practiced.

[11] In the present case the word "inmate" was not used in the indictment. Section 952, however, states that it is not necessary to use the exact language of the statute. It is sufficient if equivalent language is employed so as to inform the accused of the offense with which he is charged. The indictment does use language which means that the appellant conspired to procure, induce or encourage Nina Ezelle to become an inmate of the house of prostitution. The word "inmate" as it is used in the statute in question merely means that the female is induced or encouraged to occupy, live or abide in the house. People v. Matsicura, 19 Cal. App. 75, 124 P. 882. To allege that a female is procured "for a house of prostitution", and that she was caused to be given a medical examination "in order that * * * [she] *could be placed in said house of prostitution,"* is equivalent to stating that she was encouraged to occupy, live or remain in the house. We are unable to perceive how the appellant could have been prejudiced by the omission from the indictment of the word "inmate", since comparable language was used to clearly indicate that she was charged with violating the statute against pandering. Section 960 of the Penal Code provides that: "No indictment, information, or complaint is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

[12] Moreover, if there is an uncertainty in that regard, the indictment was susceptible of amendment and the appellant waived that defect by failure to demur to the indictment. People v. Miller, supra. In the case last cited the court said, with relation to an alleged defective information: "* * * The defendant did not demur to the information. The claim is that the information does not comply with the requirements of sections 950, 951, and 952 of the Penal Code. Section 952 provides that the statement of the offense may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the defendant notice of the offense of which he is accused. We are satisfied that the matter contained in the statement of the charge was a sufficient compliance with the Code requirements. 31 Cor.Jur. 742; 14 R.C.L. 185. If there was any noncompliance with the sections in the respect claimed, the defect was waived by failure to demur. Sections 1004, 1012, Pen.Code; People v. Mead, 145 Cal. 500, 503, 78 Pa. 1047; People v. Perfetti, 88 Cal.App. 609, 615, 616, 264 P. 318."

In the preceding case it was contended the information failed to allege facts showing an overt act constituting an attempt to commit murder. In the present case the overt act of the appellant was specifically alleged.

We conclude that the indictment in this case was not defective for the reason claimed, and that the appellant waived that alleged defect by failure to demur to the indictment.

[13] The cases cited by the appellant in support of her contention that the first

count of the indictment is defective, are not in conflict with what we have previously said in that regard. They were determined before Section 952 of the Penal Code was amended in 1927. We are satisfied there was not a miscarriage of justice in determining that the appellant was guilty of conspiring to commit the crime of pandering.

[14] With respect to the appeal which was perfected by the State from the order granting appellant's motion for a new trial upon the second count of the indictment, for an alleged attempt to commit the crime of pandering, we are of the opinion the trial court erred. The three defendants, including the appellant, were jointly charged in the second count and convicted of the crime of attempting to commit pandering in Sacramento County, by attempting "to cause, induce, persuade and encourage Nina Ezelle, a female person, to become an inmate of a house of prostitution." For the reasons previously stated we are of the opinion there is sufficient evidence to show that the appellant and the other codefendants planned and participated in Sacramento in the attempt to procure female inmates for her house of prostitution in Jackson. The jury so determined by its verdict on the first count. They were all accomplices, as that term is defined in Section 1111 of the Penal Code. They were not mere accessories thereto. Certainly there is evidence that the appellant was concerned in the commission of the crime. In view of the verdict upon the first count, independently of appellant's overt act done in Amador County, it may not be said there is no other evidence that she aided, abetted or encouraged the commission of the crime. If she did aid and abet the attempt she must be deemed to have been a principal in that crime and subject to prosecution therefor in any county having jurisdiction of the offense. (Penal Code, sec. 31.)

[15] The chief and inducing overt acts in attempting to procure Nina Ezelle to become an inmate of the Jackson house of prostitution were performed by appellant's codefendants, Benenato and Francis, in Sacramento. As a principal the appellant was responsible for such acts in furtherance of their concerted plan to attempt to commit the crime. It is true that the only overt act of the appellant which appears in evidence, was performed by her in Amador County. That was the reason assigned by the trial judge for granting the motion. But the attempt to induce the girl to become an inmate of the house of prostitution occurred or originated in Sacramento, primarily through the persuasions and conduct of Benenato and Francis. But the appellant Clark aided, abetted and encouraged that attempt, as the jury determined by its verdict on the first count of the indictment. Her participation in conspiring to commit the crime of pandering made her a principal in the commission of the attempt to commit the offense, which originated in Sacramento County. People v. Wright, 26 Cal.App.2d 197, 207, 79 P.2d 102. Even though she did commit the overt act of furthering that attempt by taking the girl to a physician in Amador County for a medical examination and she was not present in Sacramento when her codefendants persuaded the girl to become an inmate of the house, she was, nevertheless, a principal in the attempted crime. It is apparent the offense was partly committed in both Sacramento and Amador counties. That fact gives jurisdiction in either county. Section 781 of the Penal Code provides that: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

Even though the appellant was not present in Sacramento when the girl was induced to become an inmate of the house, she was nevertheless a principal in that attempt to commit the crime, and she would be guilty as such principal the same as though she had been present and had aided and abetted therein. Section 792 of the Penal Code provides that: "The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein."

[16] An attempt to commit a crime is sufficiently established when (1) the intent to commit it is shown and (2) a direct ineffectual act toward its commission is performed. (7 Cal.Jur. 875, § 31.) Any person may be convicted of an attempt to commit a crime, although it may appear at the trial that the crime was actually completed. (Penal Code, sec. 663.) In the case of People v. Grubb, supra, the defendant was charged with pandering, and he was convicted of an attempt to commit that crime. Both the defendant and the prosecutrix were living in Los Angeles. Learning that she was desirous of going to San Francisco, the defendant persuaded her to become an inmate of a house of prostitution in the last mentioned city. He wrote a letter to the matron of the house, who agreed to receive the woman in that house. The defendant directed the prosecutrix to that house and assisted her in her journey from Los Angeles. When she arrived at San Francisco she was met by the matron and taken to her house of prostitution, where she was assigned a room. But the prosecutrix refused to engage in prostitution and left the place the following day. The defendant did not go to San Francisco and he performed no overt act in that city. The defendant was tried and convicted in San Francisco County of an attempt to commit pandering. On appeal that judgment was affirmed. The Supreme Court denied a hearing. The court said [24 Cal. App. 608, 141 P. 1052]:

> "* * * In the present case, the acts of the defendant would have resulted in the commission of the offense with which he was charged, but for the refusal of the prosecuting witness above indicated, and this refusal we hold to be the extraneous circumstances which prevented the completion of the crime.
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> * * * * *
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> "The interviews between the defendant and the prosecuting witness and some of the assistance rendered by him to her, which constituted the attempt to commit the crime charged, took place in the county of Los Angeles; and for that reason the defendant claims that the superior court of the city and county of San Francisco, where the case was tried, had no jurisdiction. The crime, as we have already seen, comprised a series of acts committed, some in Los Angeles, and some in San Francisco, under such circumstances *the superior court of either of said counties had jurisdiction.* (Pen.Code, § 781.)" (Italics added.)

The appellant in this case challenges the correctness of the foregoing decision. But the principle decided in that case has been approved in several subsequent cases. In the case of People v. Mandell, 35 Cal.App. 2d 368, 95 P.2d 704, under somewhat similar circumstances two defendants were tried and convicted in Sacramento County for procuring a female by means of fraudulent representations to submit to prostitution, contrary to the provisions of Section 266a of the Penal Code. The false inducements were made in Kern County. On appeal, the judgment was affirmed. The Supreme Court denied a hearing. In the decision of that court, the Grubb case was cited with approval. The court said [35 Cal.App.2d 368, 95 P.2d 706]: "When a female person is taken for prostitution purpose by means of false inducement from one county into another county where the purpose is consummated, either of those counties has jurisdiction of the offense. [Citing authorities.]"

In the present case the attempt to procure Nina Ezelle to become an inmate of a house of prostitution originated between the appellant and her codefendants in Sacramento County. Overt acts in furtherance of that plan were performed by some of the parties in both Sacramento and Amador counties. One of the codefendants, Benenato, who took the girl to Jackson, was present in appellant's house at Jackson, when she and the girl discussed the proposal for Nina to become an inmate of that house. The plan was not consummated for the sole reason that Nina was found, on examination, to be afflicted with a venereal disease. We may assume the plan was frustrated on that ground alone. The defendants were nevertheless guilty of attempting to procure her as an inmate of the house. They are guilty of an attempt to commit pandering, under such circumstances. The motion for a new trial upon the second count of the indictment was therefore erroneously granted.

[17-20] When a defendant has been convicted upon two counts of an indictment for different offenses necessarily including the same elements, and based on the same acts or omissions, he may not ordinarily be sentenced on both counts. 24 C.J.S., Criminal Law, § 1990, p. 1214. The same acts may, however, violate different statutes and thus constitute different offenses punishable under separate statutes. If one offense requires proof of an element different from the other, they may not be deemed to constitute the same offense so as to preclude punishment for each. This is true although both offenses are founded chiefly on the same facts. People v. Coltrin, 5 Cal.2d 649, 660, 55 P.2d 1161; People v. Trantham, 24 Cal.App.2d 177, 74 P.2d 851; People v. Mazzola, 99 Cal.App. 682, 279 P. 211; In re Crawford, 109 Cal. App. 33, 292 P. 520. But it has been held that where the sentences may rest on either count and they run concurrently, the objection of double punishment may not be urged. Felio v. United States, 8 Cir., 55 F.2d 161; White v. United States, 9 Cir., 16 F.2d 870, certiorari denied 274 U.S. 745, 47 S.Ct. 660, 71 L.Ed. 1326. In the present case the attempt to commit pandering does not necessarily involve proof of a previous conspiracy to commit pandering, although the intent to violate the statute is involved in both offenses. We do not think the crimes charged in the first and second counts of the indictment are so similar that conviction upon one of them may become the basis of a plea of former jeopardy as to the other count, although the evidence in support of both charges is largely the same. The defense of former jeopardy must be pleaded. There was no such plea in this case. The charge of double punishment for two crimes founded on substantially the same evidence in most respects, may be avoided by pronouncing sentences to run concurrently.

[21] The judgment and the order denying a new trial on the first count for conspiracy to commit pandering are affirmed. The order granting appellant a new trial on the second count for an attempt to commit pandering is reversed, and the court is directed to render judgment thereon in accordance with the verdict, the sentence to run concurrently with the sentence imposed by the judgment on the first count.

ADAMS, P. J., and PEEK, J., concur.

29 Cal.2d 439

MAGGART v. STATE BAR OF CALIFORNIA.

L. A. 19774.

Supreme Court of California, in Bank.

Dec. 17, 1946.

1. Attorney and client ⚷61

Fact findings of state bar board of governors that disbarred attorney, applying for reinstatement, lacked high moral qualifications required of member of bar, was not sufficiently rehabilitated to warrant his reinstatement, and made false affidavit that certain land was unoccupied within federal Valentine Scrip Act, were sufficiently detailed to warrant board's recommendation to Supreme Court that applicant's re-admission be denied. Act Cong. April 5, 1872, 17 Stat. 649.

2. Attorney and client ⚷61

An order disbarring attorney is not final in sense that he may never resume practice of law, but after lapse of suitable time for rehabilitation, he may be reinstated on presentation of evidence that he has professional qualifications and good moral character which will make him a trustworthy and honorable member of bar.

3. Attorney and client ⚷61

The procedure for restoration of disbarred attorney's right to practice law is application for reinstatement, not petition to modify or vacate judgment of disbarment, in absence of charge going to validity of determination regarding discipline, such as extrinsic fraud.

4. Attorney and client ⚷61

Evidence supporting disbarred attorney's application for reinstatement must relate to his conduct after disbarment, and Supreme Court, after reviewing record and determining in favor of disbarment or suspension, will not reconsider evidence taken in disciplinary proceedings.

5. Attorney and client ⚷61

The state bar board of governors and special administrative committee, to which board referred disbarred attorney's application for reinstatement after Supreme Court's reference thereof to board for investigation, report and recommendation, correctly limited scope of reference to investigation specified by order of reference and properly excluded evidence attacking judgment of disbarment.

6. Attorney and client ⚷61

The burden is on disbarred attorney, applying for reinstatement, to satisfy Supreme Court by positive evidence that his effort to rehabilitate his character has been successful, and proof presented must be sufficient to overcome court's former adverse judgment of applicant's character, though application is treated by court as proceeding for admission to bar.

7. Attorney and client ⚷61

A disbarred attorney's positive misstatements of facts in testimony concerning his activities in buying and selling Valentine land scrip issued by federal government constituted convincing evidence of his lack of rehabilitation, so as to warrant denial of his application for reinstatement. Act Cong. April 5, 1872, 17 Stat. 649.

8. Attorney and client ⚷61

Testimony of disbarred attorney, applying for reinstatement, supported state bar board of governors' findings against reinstatement for want of clear showing of source of applicant's income and earnings during rehabilitation period, as required by state bar's rules.

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Proceeding by Roy E. Maggart against the State Bar of California for reinstatement as an attorney.

Application denied.

Morris E. Cohn and Laurence M. Cahill, both of Los Angeles, for petitioner.

Pierce Works and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

In 1936, following the review of a disciplinary proceeding before The State Bar, in conformity with the recommendation of the Board of Governors, Roy E. Maggart was disbarred from the practice of law. Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451. Six years later he filed with this court a petition for vacation or modification of the order of disbarment. Relief in that form was expressly denied, but the petition was treated as an application for reinstatement and referred to the Board of Governors "for such investigation, report and recommendation as may be deemed appropriate." The Board of Governors, in turn, referred the matter to a special administrative committee. After a hearing, the committee made findings and conclusions adverse to Maggart and recommended that his petition for reinstatement as a member of The State Bar be denied. More particularly, the committee found that he "has not the high moral qualifications required of a member of the Bar," that he "is not sufficiently rehabilitated to warrant his reinstatement," and that he "is not fit for readmission to the practice of law in this state."

When these findings and recommendation were presented to the Board of Governors, the question arose as to whether Maggart had sworn falsely in an affidavit which described certain land as being "unoccupied" within the meaning of the Valentine Scrip Act, 17 Stats. at L. 649. To afford opportunity for a further consideration of the effect of his affidavit, the board rereferred the matter to the committee "for the taking of such additional evidence outlined by the Examiner and such evidence in rebuttal as the petitioner may offer."

Maggart's affidavit was made in support of an application to use certain Valentine scrip in connection with the property, which was stated to be reclaimed submerged land located at Terminal Island. Maggart swore that he was "familiar with both the location and the character of the land referred to in said petition." The facts disclosed by the evidence presented to the committee upon the resubmission are that, when Maggart made the affidavit, there was upon the land a large seven unit steam plant, covering almost 40 acres and visible at a great distance, owned and maintained by Southern California Edison Company. Railroad tracks of the Union Pacific Railroad Company lead to this plant.

Following the presentation of evidence, the committee reaffirmed its previous findings. It also submitted as a part of its report and conclusions an opinion in which the law in regard to applications under the Valentine Scrip Act, supra, was considered at length. Maggart made a false oath, said the committee, when he swore that the land to which he referred was unoccupied, and it characterized his conduct in making this affidavit as inexcusable. The Board of Governors adopted the findings of the committee and recommended to this court that readmission be denied.

Maggart then filed the present proceeding. He contends that there has been no compliance with this court's order of reference because the Board of Governors did not hear the petition or base its recommendation upon sufficient findings of fact. He also asserts that the board and the committee erred in excluding evidence offered for the purpose of attacking the judgment of disbarment and to show rehabilitation. As to the committee's conclusions in regard to the affidavit made by him, Maggart claims that mere physical possession of a part of the public domain is not sufficient to give it the status of "occupied" land within the meaning of the statute. Upon the merits of his case generally, he urges that the recommendations and conclusions of The State Bar are contrary to the evidence.

[1] The petitioner's contention that the Board of Governors should have based its recommendation upon more detailed findings of fact is without merit. It is sufficient if such findings enable this court to make an intelligent and fair review of the decision of the board. McArthur v. State Bar, 28 Cal.2d 779, 783, 172 P.2d 55. Similar findings have been upheld (see McArthur v. State Bar, supra; In re Cate, 207 Cal. 443, 445, 449, 279 P. 131; In re Stevens, 83 Cal.App. 745, 746, 257 P. 218; In re Cate, 77 Cal.App. 495, 247 P. 231), and the petitioner has not been prejudiced by any lack of particularity in them.

As to the rulings upon the introduction of evidence, in the course of the proceedings before the special administrative committee and the Board of Governors, Maggart endeavored to prove that he "was not guilty of all or some of the grounds upon which he had been disbarred." In particular, he offered a receipt for $75 which, he asserts, shows that this sum was spent in accordance with the direction of his client and, therefore, exonerates him of the charge of embezzlement. Because of the exceedingly short notice of the hearing of the charges resulting in his disbarment, says Maggart, he could not produce the document at that time and it should have been received in the proceeding now under review, not only for the purpose of again determining whether he was guilty of acts justifying disbarment, but also upon the issue of rehabilitation.

[2] An order of disbarment is not final in the sense that a disbarred attorney may never resume the practice of the law. On the contrary, it is well established that such a determination does not preclude the court, upon a proper showing of reformation, to reinstate the offender. In re Andreani, 14 Cal.2d 736, 748, 97 P.2d 456; In re Stevens, 197 Cal. 408, 424, 241 P. 88; In re Treadwell, 114 Cal. 24, 26, 45 P. 993; see 9 Cal.Jur. 10-Yr.Supp. 471. "It is not the policy of the law, and is not considered to be in the interest of justice, that an attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice." In re Nisbet, 77 Cal.App. 260, 261, 246 P. 120. After suitable time for rehabilitation has elapsed, upon the presentation of evidence showing that such a person then has the professional qualifications and good moral character which will make him a trustworthy and honorable member of the bar, his right to practice may be restored.

[3-5] But in the absence of a charge going to the validity of the determination regarding discipline, such as extrinsic fraud, the procedure for that purpose is an application for reinstatement, and not a petition to modify or vacate the judgment of disbarment. See Vaughan v. State Bar, 208 Cal. 740, 742, 284 P. 909; In re Stevens, supra, 197 Cal. at page 422, 241 P. 88; In re Mash, 39 Cal.App. 548, 551, 179 P. 897. The evidence presented in support of such an application must relate to the conduct subsequent to disbarment and where this court has reviewed the record and determined in favor of disbarment or suspension, the evidence taken in the disciplinary proceedings will not be reconsidered. In re Andreani, supra, 14 Cal.2d at page 751, 97 P.2d 456; Vaughan v. State Bar, supra, 208 Cal. at page 742, 284 P. 909; see Ex parte Tyler, 107 Cal. 78, 80, 40 P. 33; In re Mash, supra, 39 Cal.App. at page 551, 179 P. 897; 9 Cal. Jur. 10-Yr.Supp. 474. Therefore, the only issues which may now be presented by Maggart concern his activities since his disbarment and his present moral qualifications, ability and learning in the law. Accordingly, the special administrative committee and the Board of Governors correctly limited the scope of the reference to the investigation specified by the order and properly excluded the evidence attacking the judgment of disbarment.

Parenthetically, it may be noted that the record of the disbarment proceeding does not support Maggart's charge concerning lack of time and opportunity to procure and present the receipt. The order to show cause requiring him to appear and answer the charges of unprofessional conduct fixed March 27 as the date of hearing. Upon the written request of Maggart, three continuances were allowed. When on April 17, the last date fixed, he failed to appear, the matter was ordered submitted upon evidence which had been taken while his counsel was present. On July 22d, Maggart appared before the Board of Governors and applied for a hearing de novo. The application was denied, but he was allowed to cross-examine the complainant and to produce additional evidence, including his own testimony.

[6] In a proceeding for reinstatement "The burden of proof is upon the one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. In re Cate, 77 Cal.App. 495, 247 P. 231; In re Nisbet, 77 Cal.App. 260, 262, 246 P. 120. It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present

stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." Kepler v. State Bar, 216 Cal. 52, 55, 13 P. 2d 509, 510; see Wettlin v. State Bar, 24 Cal.2d 862, 869, 151 P.2d 255; In re Gehring, 22 Cal.2d 708, 712, 140 P.2d 413.

[7] It is not necessary to affirm the committee's conclusions in regard to Maggart's unfitness to practice law upon the narrow ground of the legal effect of his affidavit. It appears that since his disbarment petitioner has been engaged in a multitude of enterprises, most of them centering in Washington, D. C., where he has spent by far the greater portion of his time. During practically all of this period, however, he has been mainly interested in buying and selling, either for himself or others, Valentine land scrip. This scrip consists of certificates issued by the government entitling the owner to immediate possession of unappropriated public lands not known to be mineral in their nature. Maggart, and those with whom he dealt, seemed to regard these certificates as constituting interests in oil lands, and transactions concerning them were characterized in his petition variously as purchases of "real estate," "management of investments" and the like. As a witness, in describing his activities, Maggart displayed a voluble evasiveness coupled with an eagerness to change his testimony to suit the exigencies of the moment. Whatever his cause or motive, the positive misstatements of fact with which the record abounds supplies convincing evidence of his lack of rehabilitation.

[8] The rules of The State Bar require an applicant for reinstatement to show "the approximate monthly earnings and other income of petitioner, and the sources from which all such earnings and income were derived for the period of rehabilitation." In his petition and his direct testimony he stated that in 1936, from his employment with Hancock Oil Company, he earned $7,500. In 1939, he said, he received $15,000 from the same company for services rendered prior to 1935, including the transfer of his interest in the Southwest Exploration Company. The intervening years, 1937 and 1938, according to Maggart, were given primarily to the business of the Magnor Oil Company, "which efforts were not lucrative at that time," and he borrowed $400 during 1938 which was repaid within 60 days.

He accounted for other income of 1939 as being $10,000 from Western Ship Terminals, Inc., and an additional amount of "approximately" $6,000 through the management of investments. His earnings for the following year, 1940, Maggart placed at $7,500 received from Western Ship Terminals, Inc. Employment by Arthur Holliday in 1941 brought petitioner approximately $6,000, and he testified to an additional amount of $12,000 as being profit from real estate during the same year. His average monthly earnings since the judgment of disbarment he placed at a sum in excess of $500, not including the $15,000 paid to him in 1939 by Hancock Oil Company. These amounts, Maggart declared, include all of the money he borrowed or received during the years stated.

After cross-examination, however, Maggart amended his petition to show $2,141.32 earned from the Hancock Oil Company in 1936, instead of $7,500. His 1936 income tax return corresponds with the amended figure. He was also permitted to amend his statement as to his average monthly earnings since the date of disbarment, but the new amount does not appear in the record.

According to petitioner's testimony, in 1935 he was "broke"; he was also "broke" in 1936 when he closed his law office after the disbarment. However, he declared that he paid up most of his bills, which amounted to between $5,000 and $6,000. Yet his income during 1936 was only a little more than $2,000. The next two years were given to promotional work for the Magnor Oil Company, in which he was a partner with another person. This was not a lucrative venture, he told the committee, and he received on account of the work done for it only between $2,000 and $3,000. This amount, paid by his ptrtner, was for actual expenses incurred on trips to Sacramento and San Francisco. The partner's testimony was that he had paid petitioner's expenses, totaling about $500, for this two-year period. When asked by one of the members of the committee how he had lived during 1937 and 1938 with no income, he explained that he then had some of the money paid to him by Hancock Oil Company in 1936, and his traveling expenses to Sacramento and hotel bills had been paid by his partner. Income tax returns for these two years, however, show a net income of $935.62 and $936, respectively. The record does not show the source of this income.

Under cross-examination before the committee, Maggart admitted that he did not receive any salary from Western Ship Terminals, Inc. but was paid $10,000 to cover his expenses in doing promotional work for them. He placed his actual expenses as being in excess of the $10,000 received. However, in other testimony he stated that he received no cash from Western Ship, but a 17 per cent interest in the company in lieu of expenses.

The $6,000 income from management of investments which he told the committee he received in 1939 appears to have been merely a paper profit. During that year he purchased land scrip certificates for a total of $17,100 which were sold to Western Ship for $31,111. Petitioner's expenses in connection with the location, purchase and sale of these certificates amounted to $15,350, according to his testimony. Those figures indicate a loss of about $1,300 in connection with the transaction, but petitioner testified that since he "was given a seventeen per cent interest in the certificates for finding and for handling this whole deal," he considered he had made a profit of $6,000, considering their market value. Here again there is no showing of the source of income for the payment of $1,300 of expenses incurred over and above the $31,111 selling price.

Petitioner's testimony concerning the $15,000 which he received in 1939 from Hancock Oil Company was as follows: He put $20,000 into Western Ship; part of this sum came out of the $15,000 and the balance, $10,000, was paid to him by Western Ship for expenses. He later testified that he invested no cash in Western Ship; all of the $20,000 represented expenses. Subsequently, he declared that the $15,000 was used to maintain a stock account in New York in 1940, but on the same page of the transcript he repeated his previous statement that he put most of the $15,000 into Western Ship. Other testimony by him was that the amount he invested in Western Ship was closer to $15,000 than $20,000. Since 1940, he testified, he has paid all of his own expenses in connection with his work for Western Ship and he has not asked for reimbursement.

There are other explanations by Maggart concerning his use of the $15,000 paid to him by Hancock Oil Company. He did not put the greater part of it into Western Ship, he said; the amount which went into that company was the difference between the $31,111 selling price and the $17,100 cost price of the scrip sold to them in 1939. However, he also told the committee that he put practically none of the $15,000 into Western Ship; another statement was that about $5,000 or so came from the $15,000, but none of it was invested in 1939.

The testimony with respect to petitioner's income and its sources for the years 1940, 1941 and in 1942 until the hearing before the committee is also unsatisfactory. Most of his income, he stated, was in payment of "expenses" which, he claims, he actually incurred in the interests of his promotional schemes. In fact, he testified that 80 per cent of his time was spent on such work, and there is no evidence of any other income. His testimony as to the year 1940 shows a total of $11,280 received as reimbursement for expenses incurred, but the record indicates that his actual expenses amounted to $14,756.10. Since the record discloses no earnings during this time, how he met the deficit remains unexplained.

Maggart's explanation of the inconsistencies between the income tax returns and the amounts stated in his petition is that the latter shows all amounts received by him for any purpose, while his income tax returns do not include sums paid in reimbursement for expenses. He contends that the confusion in his testimony is reasonably to be expected; no one, he says, is able consistently to recall with accuracy dates and figures. However, the contradictions and discrepancies which appear in the recital of his business affairs during recent years go far beyond the bounds of forgetfulness or inadvertence and cast considerable doubt upon his integrity. Particularly because the charges upon which he was disbarred involved, to say the least, negligence in regard to financial transactions with a client, his testimony as to his earnings since that order was made is highly significant. Moreover, the statement as to his finances which is included in his verified petition is equally unsatisfactory. Under these circumstances, the petitioner has failed to make a clear showing of the sources of his income and earnings as required by the rules of The State Bar, and the Board of Governors' findings against reinstatement are amply supported by petitioner's own testimony.

The application for reinstatement is denied.

29 Cal.2d 448

STUMP et al. v. CORNELL CONST. CO. et al.

L. A. 19486.

Supreme Court of California, in Bank.
Dec. 18, 1946.

1. Dedication 🔑32

Under Subdivision Map Act, words of dedication on a map are treated merely as an offer and the dedication is not completed until offer is accepted by city. Business and Professions Code, §§ 11500 et seq., 11590, 11591, 11611, 11616.

2. Dedication 🔑29

The Subdivision Map Act abrogates common-law rule whereby an offer to dedicate might be impliedly revoked by a conveyance without reservation. Business and Professions Code, §§ 11500 et seq., 11590, 11591, 11611, 11616.

3. Dedication 🔑35(5)

Provision in city's acceptance of offer to dedicate certain streets and alleys specifically excepting strips marked "future street" and "future alley" constituted a rejection by city of offer to dedicate such strips, but by terms of the Subdivision Map Act the rejection was not final and city was authorized to rescind the rejection and accept offer of dedication at a later date. Business and Professions Code, §§ 11500 et seq., 11590, 11591, 11611, 11616.

4. Dedication 🔑35(5)

Where subdivision map indicated dedication of strip for use as an alley by designation of strip on map as "future alley", but city, in approving final subdivision map, rejected dedication with respect to future alley, city could thereafter rescind its rejection and accept offer of dedication before express revocation of the offer, notwithstanding that subdivider had thereafter sold the land without reservation. Business and Professions Code, §§ 11500 et seq., 11590, 11591, 11611, 11616.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Lowell S. Stump and another against Cornell Construction Company and the City of Los Angeles to quiet title to a purported right of way of an alley at the rear of plaintiff's property. From a judgment for defendant city, plaintiffs appeal.

Affirmed.

Prior opinion, 169 P.2d 419.

M. C. Schrager, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones and Roger Arnebergh, Asst. City Attys., all of Los Angeles, and Victor J. Obegi, of Van Nuys, for respondents.

GIBSON, Chief Justice.

Plaintiffs have appealed from a judgment in favor of defendant city of Los Angeles determining that their title to a certain lot is subject to an easement for public alley and utility purposes.

The lot in question is part of a tract subdivided by the defendant Cornell Construction Company. In April, 1941, the company filed with the city a tentative subdivision map which contained no reference to the alley. The proposed subdivision was approved by the city planning commission subject to certain conditions requiring, among other things, that "a future alley 20 feet in width be shown. * * *" On May 22 the city council tentatively approved the proposed subdivision subject to the conditions prescribed by the planning commission. In June, 1941, the company submitted to the city council a final map of the tract which showed two parallel lines extending the full length of the tract across the rear portion of all the lots, together with labels reading: "Easterly line of 10 ft. easement to City of Los Angeles for future alley and public utility purposes." The other 10 feet for the alley apparently was to be taken from an adjoining tract.

Printed at the top of the map is a statement to the effect that the owners of the land consent to the making and recording of the map and subdivision, that they dedicate an avenue, street and boulevard to public use, and that they "hereby dedicate to public use for street and alley purposes, those certain strips of land designated as 'Future Street' and 'Future Alley,' shown on said map within said subdivision, reserving to ourselves for use of ourselves and successive owners of the respective lots shown on said map fronting on said strips, any and all ordinary uses of said land except the erection or construction of buildings thereon until such time as the legislative body shall accept the same for a public street and public alley. * * *" The quoted language was taken, with minor changes, from the form provided in the subdivision ordinance.

The final tract map was approved by the city council and recorded on August 14, 1941. The city clerk certified on the lower portion of the map as follows: "I hereby certify that the city council of the City of Los Angeles approved the attached map and accepted on behalf of the public all the streets, roads, alleys, highways and easements shown on said map and therein offered for dedication except those strips marked 'future street' and 'future alley' * * *." On August 22, 1944, the city council adopted a resolution accepting the twenty foot strip as a public alley.

On December 26, 1941, which was shortly after the approval of the final map but prior to the adoption of the resolution of acceptance, the company sold the lot in question to Edwin and Vida Freund. Although the deed referred to the map and was expressly made subject to the conditions and easements contained in the "Declaration of Establishment of Conditions and Restrictions" recorded by the company on August 7, 1941, neither the deed nor the declaration referred specifically to the "future alley" shown on the map. The terms of the deed which plaintiffs received from the Freunds on November 30, 1942, do not appear in the record.

Plaintiffs contend that there was never a completed dedication of the alley to the city, that the company merely made an offer to dedicate, and that such offer was revoked prior to any acceptance by the city. It is not claimed that there was an express withdrawal of the offer but it is argued that the conveyance made by the company to the Freunds without reservation amounted to a revocation of the offer. Plaintiffs rely upon cases decided under the common law, but in ascertaining the rights of the parties we must determine the extent to which the common law rules have been modified by the adoption of the Subdivision Map Act which was in effect when the subdivision was created. Stats.1937, p. 1863, now a part of Bus. & Prof.Code, §§ 11500 et seq.

That act (§ 20, see Bus. & Prof.Code, § 11611) required that upon approval of the final map, the governing body "shall at that time also accept or reject any or all offers of dedication * * *," and that the clerk shall certify on the map the acceptance or rejection by the public (§ 13 (c), see Bus. & Prof.Code, § 11591). Another part of section 20 of the act (see Bus. & Prof.Code, § 11616) provided: "If at the time the final map is approved any streets are rejected, the offer of dedication shall [be deemed to] remain open and the governing body may by resolution at any later date, and without further action by the subdivider, rescind its action and accept and open said streets for public use, which acceptance shall be recorded in the office of the county recorder."

[1] There is language in an early case (Myers v. City of Oceanside, 7 Cal.App. 87, 92, 93 P. 686, 688) to the effect that a dedication may be complete "if the map filed [shows] words of dedication on its face." But cf. County of Inyo v. Given, 183 Cal. 415, 418, 191 P. 688. It appears, however, that under the Subdivision Map Act, words of dedication on a map are treated merely as an offer and that the dedication is not completed until the offer is accepted by the city. Bus. & Prof. Code §§ 11590, 11591, 11611 and 11616. Therefore, the words of dedication on the map filed in the present case must be regarded as an offer to dedicate.

[2] In support of their contention that the offer was revoked, plaintiff relies upon the case of Schmitt v. San Francisco, 100 Cal. 302, 308, 34 P. 961, which holds that a conveyance without reservation amounts to a revocation of an offer for dedication. See, also, People v. Southern Pac. R. R. Co., 68 Cal.App. 153, 160, 228 P. 726. These cases, however, were decided before the adoption of the Subdivision Map Act in 1937,[*] and the provisions of that act clearly indicate an intention to abrogate the common law rule whereby an offer to dedicate might be impliedly revoked by a conveyance without reservation. There was no *express* revocation in this case and it is, therefore, unnecessary for us to determine whether the statute was intended to prevent a termination of the offer by that means.

[3, 4] The statute requires that the city either accept or reject an offer of dedication at the time it approves the final map. In the present case the city's acceptance of the offer to dedicate certain streets and alleys specifically excepted "those strips marked 'future street' and 'future alley.'" This constituted a rejection by the city of the offer to dedicate the "future alley," but by the terms of the statute the rejection was not final, the offer was deemed to remain open, and the city was authorized to rescind the rejection and accept the offer of dedication at any later date. The offer to dedicate the alley here involved was accepted and the dedication was completed in conformity with the statute by the resolution of the city council on August 22, 1944.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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29 Cal.2d 385

TRABUE PITTMAN CORP., Limited, v. LOS ANGELES COUNTY et al.

L. A. 19169.

Supreme Court of California, in Bank.

Dec. 10, 1946.

1. Taxation 🔑10

What constitutes real property for taxation purposes, within meaning of federal statute and state constitution relating to taxation of national banks' realty, is determinable by law of the state so long as there is reasonable basis for determination and no discrimination against federal instrumentalities. 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

2. Taxation 🔑65

The length of a lease cannot be made a criterion as to what constitutes a fixture for taxation purposes.

3. Taxation 🔑543(7)

The lessor of a building leased to national bank seeking to recover taxes paid under protest covering assessment on vault door and frame installed by lessee bank, had burden not merely to show that vault door was a trade fixture but that it would not have become part of realty if it had been similarly installed by lessor. 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

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[*] Earlier acts did not provide that offers of dedication should remain open nor did they contain any provisions changing the common law rules regarding revocation of such offers. (Stats.1929, ch. 837, p. 1790 et seq.; Stats.1907, ch. 231, p. 290 et seq.)

4. Statutes ⇨179

For purposes of taxation the definitions of real property in revenue and taxation laws of the state control whether they conform to definitions used for other purposes or not. Revenue and Taxation Code, §§ 104, 105; Civ.Code, §§ 660, 1019; Const. art. 13, § 13.

5. Fixtures ⇨15

A "trade fixture" is merely a particular type of fixture, one for which the law makes a special provision permitting its removal under certain circumstances by lessee from lessor's realty to which it has been annexed. Civ.Code, §§ 660, 1019.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Fixture".

6. Fixtures ⇨15

That a trade fixture is removable does not necessarily negative element of permanence and in distinguishing permanence from transitoriness it is not necessary to identify it with perpetuality. Civ.Code, §§ 660, 1019.

7. Fixtures ⇨9

The rule regarding trade fixtures which arose out of commercial necessity for limited purpose of protecting tenant in ownership of certain kinds of property has no application between other parties in other relationships. Civ.Code, §§ 660, 1019.

8. Fixtures ⇨15

Where dispute does not solely arise between landlord and tenant, trade fixtures, while annexed constitute "fixtures" for certain purposes and as part of realty, and if they are not removed during term of tenancy or within reasonable time thereafter they remain part of realty. Civ.Code, §§ 660, 1019.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

9. Fixtures ⇨15

The law with respect to tenant's trade fixtures has its foundation in implied contract resulting from landlord-tenant relationship, and contract between landlord and tenant may be express or implied and if express, it may cover fixtures other than those generally deemed to be trade fixtures.

10. Fixtures ⇨27(2)

Contract between landlord and tenant regarding tenant's trade fixtures, whether express or implied, is not effective against those not bound by the agreement such as innocent third persons in which cases intent that is material is that reasonably manifested by outward appearances.

11. Taxation ⇨65, 67

Agreement of the parties regarding trade fixtures, whether express or implied, is not binding upon taxing authorities as to whether trade fixtures should be considered personalty or realty.

12. Taxation ⇨65

In matters relating to taxation, rules more nearly conforming to those used in determining what constitutes fixtures as between grantor and grantee, vendor and vendee, or mortgagor and mortgagee should apply rather than the rule used in determining what constitutes trade fixtures or removable fixtures as between landlord and tenant.

13. Statutes ⇨219, 225¾

An erroneous administrative construction of statute does not become decisive no matter how long continued notwithstanding statute is subsequently re-enacted without change.

14. Taxation ⇨65

Vault door and frame owned and installed by national bank in leased building and permanently annexed to realty of lessor were "real property" and subject to taxation, notwithstanding that bank was a short term lessee. 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

15. Taxation ⚷65, 67

Equipment consisting of tellers' cages, wickets, counters, partitions, coupon booths, and other items having characteristics of normal trade fixtures installed by national bank in leased building were taxable as improvements to realty rather than as personalty notwithstanding that as between bank and lessor such items might also have been trade fixtures. 12 U.S.C.A. § 548; Revenue and Taxation Code, §§ 104, 105; Const. art. 13, § 16, subd. 1(a).

16. Taxation ⚷80

Where all improvements installed by lessee national bank in leased building were assessable as improvements to realty rather than personalty, the entire building including all improvements was properly assessed to lessor notwithstanding lease reserved bank's right to remove all improvements placed on premises. Revenue and Taxation Code, §§ 104, 105, 602(g), 608, 2187, 2188.

17. Taxation ⚷505

Where all improvements installed by lessee national bank in leased building were assessable as improvements to realty, if assessment to lessor was erroneous, effect of statute providing that mistake in name of owner of realty shall not render invalid a tax assessment was at least to preserve the lien for the tax against the land in view of fact that assessment was not void and imposed no personal liability against lessor but against the property. Revenue and Taxation Code, §§ 104, 105, 602(g), 608, 613, 2187, 2188.

18. Costs ⚷230

Defendants who prevailed on both appeals were entitled to their costs on such appeals. Rules on Appeal, rule 26(a).

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Trabue Pittman Corporation, Ltd., against the County of Los Angeles and the City of Los Angeles for refund of taxes paid on banking fixtures installed by plaintiff's lessee in leased premises. From a judgment, plaintiff and defendants appeal.

Reversed.

Prior opinions, 161 P.2d 10, 168 P.2d 156.

Holbrook & Tarr, Leslie R. Tarr, Freda B. Walbrecht and Sumner Holbrook, Jr., all of Los Angeles, for plaintiff-appellant.

J. H. O'Connor and Harold W. Kennedy, County Counsels, S. V. O. Prichard, First Asst. County Counsel, A. Curtis Smith, Deputy County Counsel, Ray L. Chesebro, City Atty., Louis A. Babior and Wilbur Bassett, Deputies City Atty., all of Los Angeles, for defendants-appellants.

Robert W. Kenny, Atty. Gen., John L. Nourse and James E. Sabine, Deputies Atty. Gen., Dixwell L. Pierce and F. S. Wahrhaftig, both of Sacramento, as amici curiæ, on behalf of defendants-appellants.

SPENCE, Justice.

Plaintiff and defendants have instituted separate appeals from a money judgment entered in favor of plaintiff in an action brought to recover taxes paid under protest, which appeals have been consolidated.

Plaintiff is the owner of a building leased to the Bank of America National Trust and Savings Association. Defendants are the county of Los Angeles and the city of Los Angeles. Section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548, permits the taxation of real property belonging to national banking associations "To the same extent, according to its value, as other real property is taxed." No provision is made in the federal statutes for taxation of personal property belonging to national banking associations. Article XIII, section 16, subd. 1(a), of the California Constitution provides for a tax measured by a national bank's net income in lieu of all other taxes, except taxes on real property.

The judgment entered by the trial court granted plaintiff a recovery of taxes, paid under protest, upon tellers' cages, partitions, coupon booths, counters, and certain other improvements installed by the lessee bank and assessed to the plaintiff as improvements to real property. Plaintiff appeals from the judgment entered, claiming that it should have included a recovery of taxes, paid under protest, upon a vault door and door frame, installed by the lessee bank and similarly assessed. On the other hand, defendants appeal from the judgment claiming that plaintiff was not entitled to recover any of the taxes in question.

[1] Thus the main question to be decided is whether the improvements installed in plaintiff's building by the Bank of America, a national banking association, and entered upon the tax rolls of defendants for the year 1941, constituted real property for the purpose of taxation and were therefore taxable as such, or whether such improvements remained personal property of a national banking association and were therefore not taxable. What constitutes real property for taxation purposes, within the meaning of federal law as well as the state Constitution, is determinable by the law of this state so long as there is reasonable basis for the determination and no discrimination against federal instrumentalities. Reconstruction Finance Corp. v. County of Beaver, Pa., 66 S.Ct. 992, 90 L. Ed. 1172. While plaintiff's complaint alleged certain discrimination on the part of the assessor, that question was not passed upon by the trial court. The trial court first proceeded to take evidence for the purpose of determining whether the improvements in question constituted real or personal property for the purpose of taxation, and after announcing its determination that all improvements in question other than the vault door and door frame were personal property, plaintiff's counsel stated that the question of discrimination would not be further pursued. The question of alleged discrimination is therefore not before us on this appeal.

During the years 1930 and 1931, plaintiff constructed, at the corner of Rimpau Avenue and Washington Boulevard in the city of Los Angeles, a building designed for the occupancy of stores and a supermarket. No part of the building was especially constructed or designed for use as a bank. The corner store after having been occupied by a drug store and a dress shop, was leased by plaintiff on July 31, 1936, for a term of six years to the Bank of America for the purpose of establishing a branch bank. The cost of improvements exclusive of the disputed items, was $11,630.36. At the expiration of the lease the premises were again leased to the bank for a new term of five years ending July 31, 1947. The leases contained the following pertinent provisions:

"The lessee accepts the said premises in the condition existing at the time of execution of the within lease, and it is agreed between the lessor and the lessee that all alterations, additions and repairs to be made to said premises, including the installation of vaults, vault doors and safe deposit boxes, together with bank fixtures and equipment necessary for the operation of the lessee's business in said premises, shall be made to said premises at lessee's own cost and expense.

"It is agreed that upon the expiration of this lease or upon the expiration of any extension, renewal or sooner termination thereof, lessee may remove all or any part of the furniture, fixtures, vaults, vault doors, vault door frames, safe deposit boxes, business equipment and all other improvements and personal property placed in, on or about said premises by lessee or by any predecessor of lessee, but it is agreed that upon the expiration of said term or any renewal, extension or sooner termination hereof, lessee shall not be required to remove the fixtures, vaults, vault doors, safe deposit boxes and improvements set forth above or any part thereof unless it elects so to do. * * *"

The lessee bank redesigned the exterior of plaintiff's building so as to make it more available for banking purposes and conformable in appearance to that of a bank. Brick and tile bulwarks were inserted on the original foundation walls, window space was cut down, and the entrance door was altered. Interior alterations included the construction of a vault room and the installation of a vault door, counter line, partitions, tellers' cages, wickets, etc. The vault room, built of reinforced concrete, was approximately 17 feet long, 8½ feet wide, with a door opening 7 feet 5 inches high by 3 feet 6 inches wide. In its complaint on file in the instant action, plaintiff makes the following concession in regard to the vault room and store front of the building:

"That at all times since their erection, and for the tax years 1937–38 to and including the current tax year 1941–42, said store front and vault room have been assessed and taxed, without any objection by plaintiff Landlord or lessee National Bank as to such assessment and tax, to plaintiff Landlord, as a part of the aforesaid improvements and building;

"That both plaintiff Landlord and lessee National Bank have at all times conceded, and do now concede, that, for tax purposes, the aforesaid store front and concrete vault room are improvements properly taxable to plaintiff Landlord as a part of the aforesaid building."

The bank installed, in the opening into the vault, a steel vault door frame and door comprising one unit. The door was 3½ inches thick, polished steel finish, and had a double combination and a triple time lock. Wooden wedges inserted at the top of the door and the frame held the door and frame in its vertical position. An inner air space or vestibule, approximately 3 inches in width at the sides and top walls, was composed of 3-inch by 3-inch angles and plates. Concrete grouting, in which crushed rock or gravel was intermixed with cement, was poured into this air space. When hardened the concrete grouting formed a hard and permanent attachment between the vault door frame and the vault room wall or vault door opening.

The door and door frame unit which was installed was a second-hand one taken from the bank's warehouse where a stock of used vault door frames and doors was kept on hand. It had an original cost of $1,800 to $1,900. The value thereof at the time of installation was estimated at $1,500. The counter line, with its partitions and wing appurtenances, and the coupon booths were attached to the building by drilling holes in the concrete floors into which were fitted wooden pegs to which a plate board was nailed. The wing through which there was a swinging door was steadied by a metal bracket attached to additional pegs fitted into the floor, and the door plates of the coupon booths were likewise set into the floor.

During the 1941 assessment period, after the decision of this court in the case of San Diego Trust & Savings Bank v. County of San Diego, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, the Los Angeles county assessor added to the figures, which he had in previous years fixed as the assessed value of the improvements, the sum of $660 as representing the increase in the assessed value of the improvements by reason of the attachment thereto of the bank vault door and frame. A figure of $910 was fixed as representing the increase in the assessed value of the improvements by reason of the attachment of some of the other equipment such as counter lines, tellers' cages, wickets, and coupon booths. Prior thereto the bank had notified the county assessor in writing of its claim that the vault door and other banking equipment were personal property belonging to it and should not be assessed to plaintiff landlord as constituting a part of the improvements.

The Board of Supervisors of Los Angeles County, sitting as a board of equalization, denied an application for a reduction of the assessed valuation placed upon plaintiff's property by reason of the above-mentioned improvements. Plaintiff paid the tax under protest and instituted this suit.

The trial court found "that on the first Monday of March, 1941, the bank vault door frame and bank vault door installed on said premises by the lessee National Bank were and had become integral parts of the building of the Plaintiff herein, but the Court also finds that the remaining banking fixtures assessed by the Assessor herein were trade fixtures and should have been classified by the Assessor as personal property of the lessee National Bank." Other findings and the conclusions of law indicate that the holding that trade fixtures were personal property for purposes of taxation was based upon the fact that owing to the manner of annexation they were capable of severance from the freehold without damage to either, and were subject to removal.

For the reasons hereinafter stated, we conclude that the assessment should stand in its entirety. We are in agreement with the findings and conclusions of the trial court with respect to the vault door and door frame, but are further of the view that since the other improvements in question were found to be trade fixtures, they were likewise properly assessed as improvements to the realty.

[2, 3] While it is conceded that the exterior alterations and vault room were improvements properly taxable to plaintiff, and although the appeal of plaintiff involves the vault door and door frame while the appeal of defendant involves the remaining improvements, we believe that, for the purposes of this case, all such improvements fall in the same category. The instant case, insofar as the vault door is concerned, is controlled by the decision in the San Diego Bank case. The facts there were substantially the same as here except that some of the buildings were owned by the banks occupying them while others, with one exception, were held under leases longer in duration than those entered into between plaintiff and its lessee here. Plaintiff relies upon the foregoing as a material distinguishing circumstance. However, the length of a lease cannot be made the criterion as to what constitutes a fixture for taxation purposes. To hold the length of a lease to be of controlling importance would furnish an easy means of circumvention of taxation. Moreover, the determination here will indicate to local assessors the course to be followed by them in future years, but uniformity of taxation cannot be attained unless a uniform classification of real and personal property is established. Just as assessors are not bound by private agreements, they should not be frustrated or hindered in performing their vital functions by the necessity of ferreting out the often undisclosed and secret intentions of lessors and lessees relative to the terms of a lease. For the most part, assessors must be allowed to act on the basis of outward appearances. Furthermore, for reasons that will hereinafter be more fully discussed, it was incumbent upon plaintiff not merely to show that the vault door was a trade fixture, but that it would not have become part of the real property if it had been similarly installed by the owner of the land.

Plaintiff, while contending that the improvements installed by the lessee bank, other than the vault door and door frame, constitute trade fixtures further urges that trade fixtures are personal property. Defendants contend: (1) That as a matter of law in this state trade fixtures are improvements to the realty for the purposes of taxation; and (2) that the bank equipment here involved constitutes a unit for use which gives to it the character of realty within the meaning of the holding of this court in Southern California Tel. Co. v. State Board of Equalization, 12 Cal.2d 127, 82 P.2d 422. Plaintiff rejoins that there is no factual similarity between this and the cited case.

Defendants contend that the law of this state dealing with the status of trade fixtures in general has required, and in the interest of uniformity of taxation should require, that trade fixtures be characterized as real property for taxation purposes, and not as personal property as held by the trial court. They are supported in this contention by the attorney general of this state who, by leave of court, appears on behalf of taxing agencies not parties to the action. We believe that there is merit in such contention and, after careful consideration, have concluded that it must be sustained.

[4] There can be uniformity of taxation only to the extent that there is a uniform classification of real and personal property. Disregard of any distinction between improvements installed by tenants and improvements installed by an owner of property insofar as taxation is concerned expedites the work of the assessor and tends toward uniformity. To classify trade fixtures as real property is not to obliterate the distinction between fixtures and trade fixtures for all purposes, nor to introduce an innovation into the law of trade fixtures. It is well settled that for purposes of taxation the definitions of real property in the revenue and taxation laws of the state control whether they conform to definitions used for other purposes or not. (Const., art. XIII, § 13; Ventura County v. Barry,

207 Cal. 189, 195, 277 P. 333; Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 666, 87 P. 190, 9 Ann.Cas. 1190; People v. Smith, 123 Cal. 70, 75, 55 P. 765; Jameson Petroleum Co. v. State, 11 Cal. App.2d 677, 680, 54 P.2d 776; 2 Cooley, Taxation (4th ed.) § 558, p. 1218.)

[5, 6] Section 104 of the Revenue and Taxation Code declares that real estate shall include "improvements," and section 105 defines improvements as including "fixtures." No exception is made in the case of trade fixtures. According to Burby a trade fixture is merely a particular type of fixture, one for which the law makes a special provision permitting its removal under certain circumstances by a lessee from the lessor's real property to which it has been annexed. (See Burby, Hornbook of the Law of Real Property (1943) § 24, p. 28.) Section 660 of the Civil Code defines "fixtures" as things that are permanently resting upon or attached to the land or building, but the fact that a trade fixture is removable under Civil Code, section 1019, does not, as plaintiff contends, necessarily negative such element of permanence. We have already indicated that for the most part assessors must be allowed to act on the basis of outward appearances. Moreover, in distinguishing permanence from transitoriness it is not necessary to identify it with perpetuality. Southern California Tel. Co. v. State Board of Equalization, supra, 12 Cal.2d 127, 136, 82 P.2d 422. "It appears to be sufficient that it [the article annexed] is intended to remain where placed as long as the land or building to which it is annexed may be used for the same purpose." (36 C.J.S., Fixtures, § 2, p. 900.) "It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose." San Diego Trust & Savings Bank v. County of San Diego, supra, 16 Cal.2d 142, 151, 105 P.2d 94, 98, 133 A.L.R. 416; 26 C.J. 657.

[7] The rule in reference to trade fixtures arose out of commercial necessity for the limited purpose of protecting the tenant in ownership of certain kinds of property. It generally has no application between other parties in other relationships. Bronson on Fixtures, § 8, p. 21; Tiffany, Real Property (3d ed.) § 617, p. 599. The question as to whether an improvement is a trade fixture most often arises in regard to an asserted right of removal. It may be conceded that many courts and writers have treated trade fixtures as personal property insofar as the tenant's right of removal was concerned. See American Steel & Iron Co. v. Taft, 109 Vt. 469, 199 A. 261, 263; Snow v. Smith, 86 Vt. 58, 83 A. 269, 270; Wagner v. Cleveland & T. R. Co., 22 Ohio St. 563, 10 Am.Rep. 770; Globe Marble Mills Co. v. Quinn, 76 N.Y. 23, 26, 32 Am.Rep. 259; Davies v. Iroquois Gas Corp., 161 Misc. 103 [292 N.Y.S. 111, 114]; Cohen v. Wittemann, 100 App.Div. 338 [91 N.Y.S. 493, 497]; 2 Taylor, Landlord and Tenant (9th ed.) § 549, p. 173.) Regardless of whether such characterization was strictly accurate or necessary in view of the right of removal which existed in any event, it is obvious that it can have no bearing upon what the characterization should be for other purposes. "The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty." (Ewell, A Treatise on the Law of Fixtures (2d ed.) p. 122; Ferard, Fixtures, 10.)

[8] Where the dispute did not solely arise between the landlord and tenant, trade fixtures, while annexed, have been regarded by this court as fixtures for certain purposes and as a part of the realty. San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92; People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641. If they are not removed during the term of the tenancy or within a reasonable time thereafter, they remain part of the realty. Wadman v. Burke, 147 Cal. 351, 81 P. 1012, 1 L.R.A. N.S. 1192, 3 Ann.Cas. 330; Earle v. Kelly, 21 Cal.App. 480, 132 P. 262.

In San Francisco Breweries v. Schurtz, supra, 104 Cal. 420, 38 P. 92, the dispute over ownership of trade fixtures was between a mortgagee of the leasehold premises who had foreclosed and an attaching creditor of the mortgagor. In holding for the mortgagee, this court said at page 427 of 104 Cal., at page 93 of 38 P.: "* * * The fixtures attached by a lessee to leased property become a part of the realty, and remain so until they are severed. While so attached, a mortgage of the leasehold estate covers the fixtures, and on foreclosure they are sold as a part of the realty. McNally v. Connolly, 70 Cal. 3, 11 P. 320; Ewell, Fixt. p. 275; Jones, Mortg. §§ 426, 435."

In People v. Klopstock, supra, 24 Cal.2d 897, 151 P.2d 641, the point in controversy was the matter of participation in the compensation award incident to the state's exercise of its right of eminent domain. In upholding the right of the tenant to participate, McAdam, Landlord and Tenant, fifth edition, section 10, pages 23–25, was quoted at page 903 of 24 Cal.2d, at page 644 of 151 P.2d, as follows: "The State's appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures. * * * Trade fixtures are regarded as personalty as between the tenant and owner [of the land] so far as the right of removal is concerned, but as between the tenant and the condemning party they are regarded as a part of the realty for the purpose of making compensation, so long as they remain fixtures, * * *". (Cf. City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737; In re Allen Street and First Avenue Borough of Manhattan, City of New York, 256 N.Y. 236, 176 N.E. 377; In re Widening of Gratiot Ave., City of Detroit, East Grand Blvd. to Townsend (Parcels 25, 27) 294 Mich. 569, 293 N.W. 755.

The view that trade fixtures, removable by a tenant, are a part of the realty until removed represents the weight of authority elsewhere and is regarded by Tiffany as the "much sounder view." (See Tiffany, Real Property (3d ed.) § 620, p. 605; Freeman v. Dawson, 110 U.S. 264, 270, 4 S.Ct. 94, 28 L.Ed. 141; Sampson v. Camperdown Cotton Mills, C.C., 64 F. 939, 942; Looney v. Trimount Theatres, Inc., 282 Mass. 275, 184 N.E. 683, 684; Brown v. Wallis, 115 Mass. 156, 158; Guthrie v. Jones, 108 Mass. 191, 196; Carlin v. Ritter, 68 Md. 478, 480, 13 A. 370, 16 A. 301, 6 Am.St.Rep. 467; Donnelly v. Thieben, 9 Ill.App. 495, 499, 500; 36 C.J.S., Fixtures, §§ 35, 37, pp. 970, 972.) Taylor in his work on Landlord and Tenant states that "as a general proposition, it is correct to say that fixtures are completely personalty as to the lessee's right of removal; but otherwise realty." (2 Taylor, Landlord and Tenant (9th ed.) § 549, p. 174.) Jones, in discussing this subject, states that "The doctrine of the law of landlord and tenant is not that the articles attached to the freehold remain chattels for the purposes of removal, but that, under certain circumstances, parts of the freehold may be removed by the tenant." (Jones on Landlord and Tenant, § 710, p. 831.) Burby states that "It might be contended that a tenant who affixes a chattel to leased premises does not thereby intend permanently to improve the freehold, and, accordingly, a chattel so attached should not be considered a fixture. But the courts have not adopted this reasoning. If the chattel attached would be considered a fixture, were it attached by the owner of the realty, it is a fixture if attached by a tenant. Thereafter, the thing is considered as a part of the realty, the tenant retaining the privilege of removal under the trade fixture doctrine." (Burby on Real Property (Hornbook Series, 1943) § 24, p. 28.)

Some courts have advisedly refrained from attempting to lay down fixed and definite rules that would determine the legal character of removable fixtures on all occasions. Ewell, in his treatise writes: "There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of the execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty; and this seems to apply as well to trade fixtures as to other fixtures." (Ewell, Treatise on the Law of Fixtures (2d ed.) pp. 122–124.)

Brown in his recent work on personal property states that "The rights and interests which persons have in fixtures and particularly in tenant fixtures, are not for all purposes real property rights or personal property rights but they constitute a shadow zone of rights in which both types intermingle, rights of the one type being emphasized for some purposes and rights of the other type for other purposes. * * * In harmony with the concept that property attached to the freehold by the lessee becomes a part thereof as 'real property' and remains such until it is disannexed, are the taxation cases which hold that in the absence of special or peculiar statutory enactments property or buildings affixed to or erected upon land are taxable as a part of the real estate." He further states that it seems desirable to permit assessors to act on the basis of outward appearances and not compel them to inquire into the legal status and relationship of all persons who might conceivably have an interest in a particular trade fixture or in the land. (Brown on Personal Property (1936) § 144, pp. 659–661.)

[9-11] Further support for the classification of trade fixtures as real property for taxation purposes is found in the fact that, in the last analysis, the law with respect to tenant's trade fixtures has its foundation in an implied contract resulting from the landlord-tenant relationship. (Cf. R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 711, 20 P.2d 665; General Petroleum Corp. v. Schefter, 141 Or. 349, 16 P.2d 645, 647; Howard v. Fessenden, 14 Allen, 124, 128, 96 Mass. 124, 128; First Parish in Sudbury v. Jones, 8 Cush. 184, 190, 62 Mass. 184, 190; 6 Cal.Jur., § 186, p. 310.) The contract between the landlord and tenant may be express as well as implied; and if express, it may no doubt cover fixtures other than those generally deemed to be trade fixtures. It is well settled, however, that such contract, whether express or implied, is not effective against those not bound by the agreement; for example, innocent third persons. In such cases the intent that is material is that reasonably manifested by outward appearances. See Dauch v. Ginsburg, 214 Cal. 540, 6 P.2d 952; Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524; Commercial Bank of Santa Ana v. Pritchard, 126 Cal. 600, 59 P. 130; McNally v. Connolly, 70 Cal. 3, 11 P. 320; Hammond Lumber Co. v. Gordon, 84 Cal. App. 701, 258 P. 612; Standard Oil Co. of California v. Idaho Community Oil Co., 98 Mont. 131, 37 P.2d 660. Similarly, the agreement of the parties, whether express or implied, is not binding upon the taxing authorities. San Diego Trust & Savings Bank v. County of San Diego, supra, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416; Comstock v. Town of Waterford, 85 Conn. 6, 81 A. 1059, 37 L.R.A.,N.S., 1166; Milligan v. Drury, 130 Mass 428; People ex rel. New York Edison Co. v. Wells, 135 App.Div. 644, 119 N.Y.S. 1057; Ex parte Makepeace, 31 N.C. 91.

[12] It is not necessary for us to determine here whether or not trade fixtures are properly classifiable as improvements to realty for all purposes, and we are not to be understood as making such determination. However, we are convinced that there is sound basis, both in reason and authority, for holding them to be such for the purposes of taxation. It is our view that in matters relating to taxation in this state, rules more nearly conforming to those used in determining what constitutes fixtures as between grantor and grantee, vendor and vendee, or mortgagor and mortgagee, should apply rather than the rule used in determining what constitutes trade fixtures or removable fixtures as between landlord and tenant. "It is the purpose of uniformity of taxation that all property in the state carry its fair burden and contribute its just amount in taxation to the support of the various public bodies which levy taxes." County of San Bernardino v. Way, 18 Cal.2d 647, 657, 117 P.2d 354,

361. But to hold the doctrine of trade fixtures operative in a tax matter merely because property is claimed under two ownerships instead of one would be to discriminate in favor of one owner and against another owner of similar property, not only because of the possibility of a differential between the real and personal property tax rates for a given year but because many special assessment districts impose burdens upon real property but not personal property. See Const., art. XIII, § 14; Southern California Tel. Co. v. State Board of Equalization, supra, 12 Cal.2d 127, 130, 82 P.2d 422.

Plaintiff has urged that the factor to be used in determining the constitutional exemption of national banks from local taxation is the common acceptation of the word real property, as such was defined by statutes at the time of the adoption of the constitutional exemption on November 6, 1928. Statutory law was the same then as now but plaintiff relies mainly upon the case of Woods v. Bank of Haywards, 10 Cal.App. 93, 106 P. 730, for the proposition that by prior judicial determination improvements similar to those installed by the bank in the instant case were classified as personal property in 1928. However, that case involved nothing but the rights of lessor and lessee in trade fixtures. The above cited authorities from this jurisdiction and elsewhere show that trade fixtures have been generally classified as improvements to real property when the rights of third persons, including the taxing authorities, were involved.

Since oral argument plaintiff has called our attention to the case of First Nat. Bank of Portland v. Marion County, 169 Or. 595, 130 P.2d 9. In that case a national bank occupied certain premises under a lease. Improvements owned by it were assessed as real property to it instead of to the owner of the land and building. The holding of the court was merely that under Oregon statutes the various interests in real property for purposes of taxation are not separable, and that the improvements should not have been assessed to plaintiff. The court expressly stated at page 16 of 130 P.2d: "We are not here passing upon the question of whether the plaintiff's trade fixtures and equipment are real property or personal property within the meaning of those terms as used in our tax law. Nor are we deciding whether or not such trade fixtures and equipment may be taxed to the owner of the legal estate as fixtures annexed to or improvements of real property."

[13] Plaintiff also cites Rittersbacher v. Board of Supervisors of Los Angeles County, 220 Cal. 535, 32 P.2d 135, County of Los Angeles v. Ransohoff, 24 Cal.App.2d 238, 74 P.2d 828, and RCA Photophone Inc. v. Huffman, 5 Cal.App.2d 401, 42 P.2d 1059, as evidence of an administrative practice in some counties to assess machinery and other articles of trade as personal property. These cases arose subsequent to 1928, and further, fall short of showing a uniform practice of assessors throughout the state. Such cases must be read in the light of the questions which were presented and passed upon. In the two cases first mentioned, it was contended that the assessor had wilfully adopted and deliberately pursued an erroneous, discriminatory, and inequitable method of assessing different classes of property. No question was involved as to what constitutes real or personal property, and without facts to indicate the contrary, it may be assumed that the various classifications referred to were made in conformance with law. In RCA Photophone Inc. v. Huffman, supra, the plaintiff contended that certain RCA photophone sound equipment had been assessed to the wrong person. No question was raised as to the propriety of the assessment as one of personal property.

Moreover, an erroneous administrative construction does not become decisive no matter how long continued. Estate of Madison, 26 Cal.2d 453, 463, 159 P.2d 630; Whitcomb Hotel, Inc. v. California Employment Commission, 24 Cal.2d 753, 757, 758, 151 P.2d 233, 155 A.L.R. 405. This is so even though the statute is subsequently reenacted without change. (Estate of Madison, supra.) Without language indicating the contrary, it cannot be supposed that an erroneous administrative interpretation, if any, of the statutes defining "real property" was incorporated into the Constitution, instead of the true and correct definition.

[14, 15] We conclude that there was no error in the assessment. The primary problem of the assessor was to determine whether the improvements in question were fixtures. If they were fixtures they were taxable under Revenue and Taxation Code sections 104 and 105. The further fact that as between landlord and tenant, they might also have been trade fixtures was immaterial. It follows that the trial court erred in concluding that the "remaining banking fixtures" were personal property merely because they were trade fixtures. It is doubtful whether any decision in this state is contrary to the views we have expressed, but if there be any language found in San Diego Trust & Savings Bank v. County of San Diego, supra, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, Southern California Tel. Co. v. State Board of Equalization, supra, 12 Cal.2d 127, 82 P.2d 422, or Western Union Tel. Co. v. Modesto Irr. Co., supra, 149 Cal. 662, 87 P. 190, 9 Ann.Cas.1190, which would tend to indicate that trade fixtures must be assessed as personal property, such language cannot be approved.

Having determined that all of the improvements in question were assessable as improvements to real property rather than as personal property, the question remains as to whom said improvements should have been assessed. This question was expressly left undecided in the San Diego Bank case, supra, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416. The trial court in the instant case found that the vault door was capable of being separately assessed to the lessee national bank but that the law did not require the assessor to assess it separately to the lessee, and that it was permissible for the assessor to assess it to the owner of the building. Plaintiff contends that the tax on any of the improvements that were determined to be a part of the realty should have been assessed to the lessee bank, the owner thereof, and that failure to do so rendered the entire assessment void. It bases this contention upon section 405 of the Revenue and Taxation Code, which provides that taxable property shall be assessed to the persons "Owning, claiming, possessing, or controlling it," and upon section 602 (g) of the same code, which is to the effect that the assessment roll shall show the cash value of improvements assessed to any person other than the owner of the land. Defendants argue that the finding and holding of the trial court as to assessment of the vault door is sound and contend that such is equally applicable to the trade fixtures. Further, defendants cite section 2188 of the Revenue and Taxation Code, which provides that "Every tax on improvements is a lien on the taxable land on which they are located, whether they are assessed to the landowner or to some other person"; and defendants contend that if there was any mistake, it was cured by section 613 of the Revenue and Taxation Code, which provides that "A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale"

[16] Under the circumstances of this case we believe that the entire building, including all improvements, was properly assessed to the owner of the land. There is nothing in the cited code sections to indicate that a single building should not be assessed as a single improvement. Assessments for improvements constitute "A lien on the taxable land on which they are located," as well as "Against the property assessed." (Rev. & Tax. Code, §§ 2187, 2188.) The improvement assessment is required to be shown opposite the land assessment. (Rev. & Tax. Code, § 608.) The value of a building is not a summation of the values of the component parts valued separately. The vault door and other fixtures do not now necessarily have the same value that they had when segregated, but rather the value of the building to which they have been affixed has become enhanced, and it appears from the record that it was this increase in value that was actually taken into account by the assessor. As shown by the portions of the lease and plaintiff's complaint set out earlier herein, the right was reserved to the bank to remove all improvements placed in or on the premises by it. Plaintiff now concedes that the store front and vault, which were improvements installed by the bank, were

properly assessed to plaintiff, and for similar reasons hereinabove indicated we are of the opinion that all other improvements were likewise properly so assessed. To hold otherwise would be to negative much of the gain toward expedition of the work of the assessor that results from his being able to assess all improvements as realty. An owner of a building may protect himself by contract against any increase in assessment and tax that may result from improvement thereto made by various tenants, and this would seem to be the preferable method of handling the situation rather than to burden the taxing authorities with the necessity of attempting to make multiple assessments upon various items of improvements embraced within a single structure "To require the county assessors to assess all trade fixtures in the names of the owners thereof as real property would impose upon them Herculean tasks and result principally in confusion." First Nat. Bank of Portland v. Marion County, 169 Or. 595, 130 P.2d 9, 16. In some other jurisdictions all interests in or to real estate are taxable as real property in the name of the owner of the land. See 2 Cooley, Taxation (4th Ed.) §§ 558, 559, pp. 1218, 1219; First Nat. Bank of Portland v. Marion County, [Or.] supra, 130 P.2d 9; Becker v. Mayor and Council of Borough of Little Ferry, 126 N.J.L. 338, 19 A.2d 657. As well stated by the Court of Errors and Appeals of New Jersey in the case last mentioned, at page 659 of 19 A.2d: "Cases holding that the lessee may be taxed by reason of his interest in real estate do not relieve the landowner of his obligation. The fee cannot be carved to the disadvantage of the municipality. If the owner of land is desirous of avoiding taxes, which the tenant should pay, he may arrange so by contract. But the municipality in assessing land is not obliged to cast around to see who has a leasehold interest therein."

[17] In any event (assuming but not conceding that the assessment to plaintiff was erroneous), the effect of the abovementioned section 613 of the Revenue and Taxation Code would be at least to preserve the lien for the tax against plaintiff's land. (Rev. & Tax. Code, § 2188.) The assessment was not void. It imposed no personal liability against plaintiff but was against the property. Klumpke v. Baker, 131 Cal. 80, 82, 63 P. 137, 676; see, also, Webster v. Somer, 159 Cal. 459, 114 P. 575; Palomares Land Co. v. Los Angeles County, 146 Cal. 530, 80 P. 931; Henne v. County of Los Angeles, 129 Cal. 297, 61 P. 1081; McCracken v. Hummel, 43 Cal.App.2d 302, 110 P.2d 700; Interstate Realty & Improvement Co. v. Clark, 77 Cal.App. 558, 247 P. 244. The case of Kern Valley Water Co. v. County of Kern, 137 Cal. 511, 70 P. 476, relied upon by plaintiff, is not contrary to the foregoing conclusion as it is clearly distinguishable upon its facts. Furthermore, that case arose upon demurrer and the question of the effect of the provision in regard to mistake in the name of the supposed owner (then contained in § 3628 of the Pol. Code) was not considered.

For the reason stated, it follows that the trial court erred in entering a judgment which allowed a recovery by plaintiff of any of the taxes in question. While it appears from the findings of fact and conclusions of law that the trial court allowed a recovery of the taxes paid on certain improvements and denied a recovery of the taxes paid on certain other improvements, the judgment entered in favor of plaintiff was a simple money judgment covering the former, which judgment must be reversed.

[18] The judgment is reversed and as defendants have prevailed on both appeals, they are entitled to their costs on said appeals. (Rules on Appeal, Rule 26(a), 22 Cal.2d 1, 18.)

GIBSON, C. J., and SHENK, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, J., did not participate herein.

29 Cal.2d 423

In re LORING'S ESTATE.

LORING et al. v. TOWN OF KINGSLEY et al. (two cases).

BRAILLE INSTITUTE OF AMERICA, Inc., v. SAME.

L. A. 19393.

Supreme Court of California, in Bank.

Dec. 17, 1946.

1. **Executors and administrators 🔑315(6)**

A decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and the rights of all parties thereunder.

2. **Judgment 🔑688**

The administration of a decedent's estate involves a series of separate proceedings, each of which is intended to be final, not only as to parties who appear therein, but as to all persons "interested in the estate" within meaning of the Probate Code, whose rights may be affected although they did not appear therein. Probate Code, §§ 361, 370, 407, 442, 522, 584, 681, 756, 810, 831, 841, 860, 921, 922, 927, 1000, 1010, 1020, 1200, 1202.

3. **Executors and administrators 🔑314(4)**

A posted notice to all persons interested to appear and show cause why order of distribution of estate shall not be made is sufficient to bind a beneficiary. Probate Code, § 1200.

4. **Judgment 🔑683**

The assignee of an heir, devisee or legatee of a deceased, is bound by decree of distribution of deceased's estate insofar as it determines the rights that the assignor would have in the estate had no asignment been made.

5. **Trusts 🔑96**

The distinction between the position of the beneficiary of a testamentary trust and the position of the beneficiary of a constructive trust under an agreement between a testator and his devisee that devisee will hold the property devised as trustee is that the interest of a beneficiary of a constructive trust does not arise under the will or laws of intestate succession.

6. **Executors and administrators 🔑315(6)**

A beneficiary of a testamentary trust is a "devisee" or "legatee" within meaning of provision of Probate Code that decree of distribution of an estate shall be conclusive only as to the rights of an heir, devisee, or legatee. Probate Code, § 1021.

See Words and Phrases, Permanent Edition, for all other definitions of "Devisee" and "Legatee".

7. **Executors and administrators 🔑315(6)**

All persons who may have acquired rights to the property of a deceased under his will or under rules of intestate succession, are included within words "heir", "devisee", or "legatee" within meaning of provision of Probate Code that a decree of distribution of a deceased's estate shall be conclusive only as to rights of an "heir" "devisee" or "legatee". Probate Code, § 1021.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

8. **Executors and administrators 🔑315(6)**

If trust provisions of a will are either entirely valid or entirely void, the decree distributing the trust estate to the trustee will, once final, conclusively establish the validity of the trust, since there can be no distribution to the trustee unless the trust is valid.

9. **Executors and administrators 🔑315(6)**

If a trust is of such a nature that in case of its partial invalidity, the trust estate will be reduced and the property involved will go to others than the trustee, a distribution of the whole to the trustee is conclusive.

10. **Courts 🔑26**
Executors and administrators 🔑315(6)
Judgment 🔑691

Where superior court sitting in probate had jurisdiction to pass on the validity of residuary provisions of testamentary trust, it had jurisdiction to pass on the validity of other provisions thereof, and beneficiaries of trust, though not parties, were bound by court's holding concerning the validity of the other provisions of the trust.

11. Executors and administrators 🔑315(6)

Once final, an erroneous decree of distribution of an estate, like any other erroneous judgment, is as conclusive as a decree containing no error.

12. Executors and administrators 🔑315(6)

Where circumstances were different than at time of decree of distribution of estate, Probate Court had jurisdiction to determine, in light of changed circumstances, how to divide trust estate among beneficiaries, but it could not make such determination by reopening issues conclusively passed on in distribution proceedings. Probate Code, § 1120.

13. Wills 🔑680

Though testamentary trusts are, for purposes of convenience, placed under supervision of Probate Courts, the substantive law governing such trusts, after final decree of distribution, is the law of trusts and not the law of wills. Probate Code, § 1120.

14. Executors and administrators 🔑315(6)

Where assets of testamentary trust estate were insufficient to pay all beneficiaries of trust in full, decree of final distribution of estate was alone the measure of the rights of the beneficiaries of the trust and, in absence of any provision therein as to any preference, beneficiaries were required to share the loss ratably, and therefore testator's kindred, who were among the beneficiaries, were not entitled to preference in payment under Probate Code. Probate Code, §§ 752, 1120.

15. Charities 🔑4

The fact that, in making a gift to establish an institution that is otherwise charitable, the donor provides that the institution shall be named for him or some other party, does not indicate a lack of charitable intent.

16. Charities 🔑31

Ordinarily it is unnecessary to go behind decree of distribution of estate to determine the testator's charitable intention.

17. Charities 🔑31

Generally, in case of doubt, a gift must be interpreted in favor of a charity.

18. Charities 🔑4

The fact that testator's gift to town of money for construction of a hospital to bear testator's name was allegedly intended primarily to establish a memorial to testator and that only a smaller sum was available for building the hospital because of shrinkage of trust estate, did not require denial of gift to town.

19. Charities 🔑37

Where assets of trust estate shrank, so that testator's gift to town for construction of a hospital was insufficient to construct hospital as intended by testator, cy pres doctrine was applicable notwithstanding provision in will that gift should absolutely lapse if town failed to secure required site for hospital within two years after notification by trustees that specified sums were available.

20. Charities 🔑37

Under doctrine that a court of equity will carry out the general charitable intention of a donor, where his specific purpose becomes impossible or impractical of fulfillment, by directing the application of the property to some charitable purpose closely approximating his general charitable intention, if the donor's charitable intention is specific and it becomes impossible or impracticable to fulfill it, a provision in the trust for a gift over in event of failure of the particular charitable purpose prevents application of the cy pres doctrine.

21. Charities 🔑28
Trusts 🔑58

Independently of the cy pres doctrine, a court of equity has power to modify the terms of a trust, both private and charitable, to carry out substantially the testator's intention.

22. Charities 🔑37

Where, because of shrinkage of trust assets, only $15,000 to $18,000 remained for building of hospital, but evidence showed that town to which testator bequeathed the money had a population of only 1,145, that town had no hospital, and that because of low construction costs a hospital adequate for town's normal needs could be built for about $15,000, modification of trust to enforce gift for a smaller hospital was proper.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of George E. Loring, deceased, wherein the trustees, under the will of the deceased petitioned for instructions as to the distribution of the assets of the trust estate, and wherein separate answers were filed by the Town of Kingsley, the Braille Institute, and by Sarah M. Loring and others. From an order directing the trustees with reference to distribution of the trust estate, the Town of Kingsley, the Braille Institute of America, Inc., and Sarah M. Loring and others appeal.

Order modified and, as modified, affirmed.

Prior opinion, 168 P.2d 224.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for appellant Town of Kingsley, Iowa.

O'Melveny & Myers, Louis W. Myers, Fred H. Schmidt and Pierce Works, all of Los Angeles, for appellants Sarah M. Loring and others.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for appellant Braille Institute of America, Inc.

TRAYNOR, Justice.

George E. Loring died testate leaving the residue of his estate to trustees whom he directed to pay within five years of his death bequests aggregating $111,000. Of that amount the Town of Kingsley, Iowa, was to receive $75,000 for the construction and maintenance of a hospital; Braille Institute of America, Inc., was to receive $10,000; and the balance with the exception of a bequest of $5,000 to a stranger to his blood, was to go to nine nieces, nephews and grandnephews of the testator. Within the same period of time his sister was to receive the remainder of the trust estate and the trust was thereupon to terminate. The foregoing dispositions were incorporated in the decree of final distribution under which the trustees received assets valued at more than $150,000, and that decree became final. Less than three years thereafter and before any payment had been made by the trustees, the value of the trust estate had shrunk to approximately $55,000. The trustees therefore petitioned the probate court for instructions as to the distribution of that amount among the beneficiaries of the trust. Separate answers were filed by the Town of Kingsley, the Braille Institute and a group of beneficiaries comprising testator's sister, one of his nieces and his two grandnephews. The latter group will hereinafter be referred to as the Lorings. The court held that the provisions of section 41 of the Probate Code restricting gifts to charities to one-third of the testator's estate were applicable to the bequests to the Town of Kingsley and the Braille Institute and accordingly instructed the trustees to distribute to them one-third of the aggregate of the amount now available for distribution plus approximately $11,000 previously distributed during probate plus any refund of federal estate tax. Of the amount so distributable to them the Town of Kingsley was to receive 15/17 and the Braille Institute 2/17. The court further directed that the individual beneficiaries be paid in full and that the residue be delivered to testator's sister. The Town of Kingsley and the Braille Institute appeal from the order insofar as it limits them to one-third of the estate. The Lorings appeal from the order insofar as it directs that any part of the trust estate be distributed to the Town of Kingsley.

The Lorings contend not only that the testator could not leave more than one-third of his estate to charities, but that he could not leave any property in this state to a municipal corporation of another state; that the decree of distribution determined neither of these issues; and that in any case the kindred of the testator should be paid in full before any payment is made either to the town or to the institute, for section 752 of the Probate Code requires legacies to nonkindred to abate before legacies to kindred abate. The town contends that the decree of distribution is res judicata as to its right to take at all under the will of a California testator, as to its right and that of the institute to take more than one-third of his estate, and as to their right to share proportionately with the other beneficiaries in the available funds, and that in any event the will of the testator expressed the intention that no preference be given to any beneficiary of the trust. The institute joins in these contentions.

[1] It is settled, and the Lorings concede, that a decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and of the rights of all parties thereunder. Estate of Easter, 24 Cal.2d 191, 194, 148 P.2d 601; Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322; McLellan v. McLellan, 17 Cal.2d 552, 553, 110 P.2d 1034; Manning v. Bank of California, 216 Cal. 629, 634, 15 P.2d 746; Whittingham v. California Trust Co., 214 Cal. 128, 132, 4 P.2d 142; Luscomb v. Fintzelberg, 162 Cal. 433, 438, 123 P. 247; Keating v. Smith, 154 Cal. 186, 191, 97 P. 300; Matter of Trust of Trescony, 119 Cal. 568, 570, 51 P. 951; Goad v. Montgomery, 119 Cal. 552, 557, 558, 51 P. 681, 63 Am.St.Rep. 145; Goldtree v. Allison, 119 Cal. 344, 345, 51 P. 561; Crew v. Pratt, 119 Cal. 139, 151, 51 P. 38; Estate of Lingg, 71 Cal.App.2d 403, 409, 162 P.2d 707; Estate of White, 69 Cal.App.2d 749, 755, 160 P.2d 204; Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 340, 146 P.2d 962; McGavin v. San Francisco, P. O. A. Soc., 34 Cal.App. 168, 173, 167 P. 182. The Lorings contend, however, that that determination does not conclude the beneficiaries of a testamentary trust, for the beneficiaries of such a trust are not parties to the distribution proceedings and in fact have no rights as beneficiaries until the trust is created by distribution of the trust assets to the testamentary trustee. They concede that under section 1020 of the Probate Code they could have appeared in the distribution proceedings as persons "Interested in the estate," but contend that they were not required to do so and that they lost none of their rights for not appearing therein. To bolster their contention that they were not parties to those proceedings they further contend that they could neither have petitioned for distribution nor sued the executors after distribution for their share of the estate. They point out finally that section 1021 of the Probate Code provides that the decree shall be conclusive only as to the rights of "Heir, devisee or legatee."

[2] The administration of a decedent's estate involves a series of separate proceedings, each of which is intended to be final (Estate of Davis, 151 Cal. 318, 323, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105), not only as to the parties who appear therein, but also as to all persons "interested in the estate" whose rights may be affected, although they did not appear therein. In fact, it is undoubtedly because all such persons were to be bound by various orders and decrees entered in the course of the administration of the estate, that the Legislature expressly provided that they might appear and protect their rights in the proceedings that lead to such orders and decrees. See Prob.Code, §§ 361, 370, 407, 442, 522, 584, 681, 756, 810, 831, 841, 860, 921, 922, 927, 1000, 1010, 1020, 1200. Thus, section 1020 of the Probate Code does more than merely give, as the Lorings contend, a beneficiary an opportunity to litigate before the final distribution of the estate, the question as to his rights under the trust that he would otherwise litigate at some later date and that he remains entitled to litigate at such later date. It assumes that these rights will necessarily be adjudicated in the distribution proceedings and it is for that reason and because a beneficiary would otherwise have no opportunity to be heard, that he is given the opportunity to appear in those proceedings.

[3] Section 1020 of the Probate Code requires that the estate be distributed only after notice has been given as provided in section 1200 of that code. The Lorings point out that under the latter section and section 1202 of the Probate Code they could have asked that special notice of the distribution proceedings be given them and contend that they are not bound by those proceedings, since they did not choose to ask for such notice. Section 1200 provides, however, in addition to the special written notice that any person interested in the estate may request, for a posted notice to "All persons interested to appear * * * and show cause * * * why the order should not be made." Section 1200 further provides that, if the court finds in its order that notice has been regularly given, that order, "When it becomes final, shall be conclusive upon all persons." A posted notice is therefore sufficient to bind a beneficiary

and it appears that it is because the Legislature contemplated that he would be bound by such notice that provision was also made as a protection against possible unfairness for him to request, if he wished to do so, that he be given special written notice of the proceedings.

[4] The Lorings contend that a decree of distribution is conclusive only as to the rights of heirs, devisees and legatees; that a beneficiary under a testamentary trust belongs to none of these classes; and that he should no more be bound by the decree than the creditor or assignee of an heir or legatee or the beneficiary of a constructive or resulting trust. In this connection the Lorings rely upon a series of cases in which this court stated that, although a decree of distribution is conclusive as to the rights of heirs, devisees and legatees, "It is conclusive against them only as heirs, legatees, or devisees,—only so far as they claim in such capacities." Chever v. Ching Hong Poy, 82 Cal. 68, 71, 22 P. 1081, 1082; see, also, Kingsbury v. Ross, 217 Cal. 484, 486, 19 P.2d 784; Parr v. Reyman, 215 Cal. 616, 619, 12 P.2d 440; Cooley v. Miller & Lux, 156 Cal. 510, 515, 105 P. 981. These cases all involved a situation in which an heir, devisee or legatee conveyed his share in the estate before the decree of distribution. They hold that that decree is not conclusive as between such heir, devisee or legatee and his assignee and with respect to the rights arising under the assignment, even though the assignee is also an heir, devisee or legatee of the decedent. It is settled, however, that the assignee is bound by the decree insofar as it determines the rights that his assignor would have in the estate had no assignment been made. William Hill Co. v. Lawler, 116 Cal. 359, 362, 48 P. 323. In Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459, upon which the Lorings also rely, a judgment creditor of a devisee secured a lien upon that devisee's share of the estate before the decree of distribution. This court held that the subsequent distribution of that share to the devisee did not discharge the creditor's lien. It was pointed out that "The expression in some of [the] cases to the effect that under the notice for distribution the whole world is brought before the court, and that every person entitled to assert a claim against the estate must present the same, or lose his right thereto, is to be construed in connection with the authority of the court over the subject-matter before it. The court has jurisdiction to distribute only the estate of which the decedent was possessed at the time of his death, and it is only a claim against that estate, or for some portion of it, for which it can make provision in its decree. As it can exercise this jurisdiction over only the persons to whom the estate is to be distributed, it is only these persons who can be affected by the notice or required to give it any attention." 137 Cal. at page 359, 70 P. at page 461. Thus, none of these cases support the Lorings' position, but merely emphasize that, as this court said in In re Burdick, 112 Cal. 387, 393, 44 P. 734, 735, "The decree of distribution is conclusive only as to the succession or testamentary rights."

[5] There is a clear distinction between the position of the beneficiary of a testamentary trust and the position of the beneficiary of a constructive trust under an agreement between a testator and his devisee that the latter will hold the property devised as trustee. The interest of the beneficiary of a constructive trust does not arise under the will or the laws of intestate succession. Sears v. Rule, 27 Cal.2d 131, 139, 163 P.2d 443 and cases there cited.

[6, 7] If the Lorings' contention that a beneficiary under a testamentary trust is neither an heir, nor a legatee, nor a devisee within the meaning of section 1021 of the Probate Code is now re-examined in the light of the cases holding that, although persons without the scope of testamentary or intestate succession are not bound by the decree, persons within that scope are bound thereby, the conclusion is inevitable that such beneficiary must be regarded as a legatee or devisee under that section. The Lorings point out that elsewhere in the Probate Code reference is made both to heirs, devisees, legatees and to beneficiaries under a trust (e. g., § 1202). Whatever be the meaning of the words "heir, devisee or legatee" in other

parts of the code, however, they were intended in section 1021 to cover beneficiaries under a testamentary trust as well as all other persons who may have acquired rights to the property of a decedent under his will or under the rules of intestate succession. This conclusión is strengthened by the fact that the beneficiary of a testamentary trust may petition for distribution of the estate to the testamentary trustee (Estate of Baldwin, 21 Cal.2d 586, 592, 134 P.2d 259; Estate of Marre, 18 Cal.2d 184, 190, 114 P.2d 586; Estate of Friedman, 171 Cal. 431, 441, 153 P. 918; In re Mackay, 107 Cal. 303, 307, 40 P. 558; Estate of McGirl, 125 Cal.App. 310, 313, 13 P.2d 746), although section 1020 of the Probate Code only provides that such petition can be filed by "The executor or administrator, or * * * any heir, devisee or legatee, or his assignee, grantee or successor in interest * * *."

[8-11] The Lorings further contend that, although the decree of distribution is conclusive as to the rights of the beneficiaries of a testamentary trust, it is conclusive only as to those rights that were necessarily in issue in the distribution proceedings, and that none of the rights now being asserted are such as were or must be deemed to have been in issue therein. They concede, as they must, that if the trust provisions of the will were either entirely valid or entirely void, the decree distributing the trust estate to the trustee would, once final, conclusively establish the validity of the trust, for there can be no distribution to the trustee unless the trust is valid. Similarly, if the trust were of such a nature that in case of its partial invalidity the trust estate would be reduced and the property involved would go to others than the trustee, a distribution of the whole to the trustée would be conclusive. The Lorings contend, however, that in the present case the provisions of the trust were such that the entire trust estate would have been distributed to the trustees, regardless of the invalidity of the bequests to the town and the institute, so that there was no need for the probate court to pass upon their validity in the distribution proceedings. It is true that a determination by the probate court of the partial or total invalidity of the charitable provisions of the trust would simply have increased the share of the residuary beneficiary. It would have increased it, however, only on the assumption that the provisions in favor of the residuary beneficiary were themselves valid. Although the provisions in favor of decedent's sister appear to be valid, the fact remains that it was necessary for the probate court to pass upon their validity before it could decide that the other provisions of the trust need not be passed upon. The logic of the Lorings' position would thus lead us to make a distinction between cases in which the testamentary trust contains no residuary clause and in which the decree of distribution is therefore conclusive as to the validity of all the provisions of the trust and cases in which the trust contains a residuary clause and the decree is conclusive only as to the validity of that clause. Moreover, the question is not whether it was proper for the probate court to pass upon the validity of all the provisions of the trust, but whether, assuming that it did, its determination is conclusive. Since the court had jurisdiction to pass upon the validity of at least the residuary provisions of the trust, it clearly had jurisdiction to pass upon the validity of the other provisions thereof. Although the Lorings contend that it did not pass upon the validity of the other provisions the wording of the decree compels the conclusion that it did. It may well be that in doing so it failed to consider the provisions of the Probate Code restricting charitable bequests to one-third of the estate and erroneously held all the provisions of the trust to be valid. It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error. Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508; Manning v. Bank of California, supra, 216 Cal. 629, 634, 15 P.2d 746; Luscomb v. Fintzelberg, supra, 162 Cal. 433, 438, 123 P. 247; Keating v. Smith, supra, 154 Cal. 186, 191, 97 P. 300; McGavin v. San Francisco P. O. A. Soc., supra, 34 Cal.

App. 168, 173, 67 P. 182; see 11B Cal.Jur., Executors and Administrators, § 1296.

The Lorings rely upon Estate of Campbell, 175 Cal. 345, 165 P. 931. In that case this court reversed a decree of partial distribution that gave the heir at law of the testator two-thirds of her estate on the ground that her will was invalid to that extent. The will provided for a trust for the life of a certain beneficiary with remainder to charities under certain contingencies. This court held first that, since the charitable provisions were not part of the trust, the heir at law could in no case receive two-thirds of the estate free of that trust, and second that, the contingencies upon which the gift to charities depended were of such a nature that it could not be determined at that time whether that gift exceeded one-third of the estate. It was held accordingly that "The only way in which the rights of all parties can be fully protected is at this time to distribute all the property to the trustee for the purposes of the trust, reserving the matter of further distribution until the termination of the trust, at least in so far as the charitable bequest is concerned." 175 Cal. at page 352, 165 P. at page 934. It may be that further distribution should have been similarly reserved in the present case. It was not, however, nor was any appeal taken from the decree providing that the Town of Kingsley was to receive $75,000 and the Braille Institute $10,000.

[12] The Lorings contend that the issues in the present case arose after the decree and because of a change in circumstances unforeseen at the time it was rendered; that these issues are cognizable in equity only; and that the probate court has no equity jurisdiction, save the limited jurisdiction that it can exercise after distribution under the provisions of section 1120 of the Probate Code. They further contend that it is that limited jurisdiction that the court should now exercise and that to hold that decree of distribution is res judicata as to the issues in the present case would render section 1120 meaningless, for it would give the court no jurisdiction except to "rubber-stamp" the decree of distribution. It must be conceded that circumstances now are different from those at the time of the decree and that the probate court has jurisdiction to determine in the light of the changed circumstances how to divide the trust estate among the beneficiaries. It cannot make that determination, however, by reopening issues that were conclusively passed upon in the distribution proceedings. Section 1120 itself contemplates that the exercise of the court's equity jurisdiction is so limited, for it provides that the court may determine to whom the property shall pass upon the termination of the trust, "To the extent that such determination is not concluded by the decree of distribution."

[13, 14] It is further contended that since the assets of the trust estate are insufficient to pay all the beneficiaries of the trust in full, preference in such payment must be given to the kindred of the testator under Probate Code section 752. The Lorings rely on Estate of Wever, 12 Cal.App.2d 237, 243, 55 P.2d 279 wherein it was held that under this section, in the absence of a different intent expressed in the will, legacies to kindred of the testator are to be given preference over other legacies of the same class where the property at the time of the decree of distribution is insufficient to pay all such legacies in full. Section 752, however, has no application to a depreciation in the value of trust assets after those assets have been distributed to the trustees. Its place in the Probate Code indicates that it applies only to proceedings in the course of the administration of the estate. Although testamentary trusts are, for purposes of convenience, placed under the supervision of the probate courts (Prob. Code, § 1120), the substantive law governing such trusts after the final decree of distribution is the law of trusts and not the law of wills. This law, as respects this case, is no different from that applicable to an inter vivos trust. Clearly section 752 would not determine the shares of beneficiaries in the event of depreciation of the corpus of an inter vivos trust. The decree of final distribution alone is now the measure of the rights of the bene-

ficiaries of the trust and, in the absence of any provision therein as to any preference among beneficiaries, they must share the loss ratably.

[15] Aside from the question of the finality of the decree of distribution, it is contended that the gift to the town was intended primarily to establish a memorial to the testator and that since only a smaller sum is now available for building, furnishing, and maintaining the hospital, it would be an erroneous application of the cy pres doctrine to uphold the gift to the town. This contention is based on the fact that the decree of distribution, in the terms of the will, provides that the hospital will be known as the "George E. Loring Hospital." It is contended that, because a memorial as elaborate as that anticipated by the testator cannot be constructed, the gift must fail. The fact that, in making a gift to establish an institution that is otherwise charitable, the donor provides that the institution shall be named for him or some other party does not indicate a lack of charitable intent. Parsons v. Childs, 345 Mo. 689, 698, 136 S.W.2d 327; Noel v. Olds, 78 U.S.App. D.C. 155, 138 F.2d 581, 585, and cases there collected. Such a requirement is regarded as part of the scheme of administration rather than the inducement for the gift. Village of Hinsdale v. Chicago City Missionary Society, 375 Ill. 220, 234, 30 N.E.2d 657.

[16-18] It is ordinarily unnecessary to go behind the decree of distribution to determine the charitable intention of the testator. See Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 338, 146 P.2d 962. Even if the decree of distribution is considered equivocal in this respect, the evidence of the testator's purpose in providing for the hospital supports the conclusion that he had a charitable intent. The evidence shows that the testator had been reared in the Town of Kingsley and made most of his fortune there. It does not follow that because he wanted the hospital named after him he was not concerned with the welfare of the inhabitants of the town. In any event, in view of the general rule that in case of doubt a gift must be interpreted in favor of a charity (Collier v. Lindley, 203 Cal. 641, 654, 266 P. 526; O'Hara v. Grand Lodge, I. O. G. T., 213 Cal. 131, 141, 2 P.2d 21; Zollman, American Law of Charities, §§ 569-571), we cannot hold that the naming of the hospital indicates a lack of charitable intention, or shows that, had he considered the matter, the testator would have preferred no hospital to the less imposing structure that may be constructed with the funds available.

[19] A further issue arising from the insufficiency of the trust assets to carry out completely the express provisions of the decree of distribution remains for decision. The Lorings contend that the testator had no general charitable intention which is normally considered a requisite to the judicial application of the cy pres doctrine (see, cases collected, 74 A.L.R. 671; 39 Col.L.Rev. 1358), that his intention was specific, and that since it cannot be literally carried out, the lack of a general charitable intention precludes any modification of the trust. This contention is based primarily on the provision in the decree of distribution, following the language of the will, that, if within two years after notification by the trustees that the specified sums were available, the town fails to secure the required site for the hospital, "then this bequest shall absolutely lapse and the said sum of $75,000 provided for and not applied according to this trust for said hospital and heating plant, shall thereupon pass under the residuary clause of decedent's will." Since the funds are not to be applied to a different charitable purpose, if the town fails to secure a site as required by the decree, it is reasonable to construe this provision as precluding their application to a different charitable purpose, if for other reasons the particular purpose of the testator cannot be carried out. It does not follow, however, that the particular purpose of the testator cannot be carried out because there are less funds available than he had contemplated. It is sufficient if that purpose can be substantially carried out.

[20] The cy pres doctrine has meant many things to many courts and its limits have rarely been defined. (See 2 Bogert, Trusts and Trustees, § 433, p. 1295 et seq.;

3 Scott on Trusts 2104.) The Restatement limits the doctrine to the rule that a court of equity will carry out the general charitable intention of the donor, when his specific purpose becomes impossible or impractical of fulfillment, by directing the application of the property to some charitable purpose that closely approximates his general charitable intention. (Rest. Trusts, § 399; see Bogert, Op. cit. supra, § 431, at page 1287.) If the doctrine is confined within these limits, it follows that, if the charitable intention of the donor is specific and it becomes impossible or impracticable to fulfill it, a provision in the trust for a gift over in the event of the failure of the particular charitable purpose prevents the application of the cy pres doctrine.

[21] The specific charitable purpose does not become impossible or impractical of fulfillment, however, simply because it cannot be carried out in the exact terms of the gift. Many cases recognize that, independently of the cy pres doctrine, a court of equity has the power to modify the terms of a trust in order substantially to carry out the intention of the testator. This rule applies both to private trusts (Adams v. Cook, 15 Cal.2d 352, 361, 101 P.2d 484; Rest. Trusts, § 167; 3 Scott on Trusts, § 167), and to charitable trusts. (Rest. Trusts, § 381, and comment (a) thereunder.) Thus, where the doctrine of cy pres is confined within the limits defined above, the equitable power of a court to modify the trust has been applied to carry out the specific charitable intention of the donor. Allen v. Trustees of Nasson Institute, 107 Me. 120, 124, 77 A. 638; Manufacturers Nat. Bank v. Woodward, 141 Me. 28, 38 A.2d 657, 658; South Kingstown v. Wakefield Trust Co., 48 R.I. 27, 32, 134 A. 815, 48 A.L.R. 1122. A substantially similar doctrine is recognized in jurisdictions in which the cy pres doctrine is said not to apply. National Bank of Greece v. Savarika, 167 Miss. 571, 593, 148 So. 649; Noble v. First National Bank, 236 Ala. 499, 183 So. 393, 396; Dunn v. Ellisor, 225 Ala. 15, 141 So. 700, 701. Even in those jurisdictions in which the definition of the cy pres doctrine appears to be broader in scope, there is authority that this equitable doctrine of modification or approximation is included within the broader principle. Crawfordsville Trust Co. v. Elston Bank & T. Co., 216 Ind. 596, 614, 25 N.E.2d 626; Parsons v. Childs, supra at 695; and see Village of Hinsdale v. Chicago City Missionary Society, supra, 375 Ill. at page 234, 30 N.E.2d 657. Under any of these views, there is no reason why a particular charitable purpose may not be substantially carried out, even though there is a provision for a gift over and the testator may not have had an intention to aid charity in general.

The trust assets available for distribution will amount to approximately $55,000 plus an undetermined refund of federal estate taxes if the Town of Kingsley takes its pro rata share, whereas the gifts under the trust total $111,000. If the trust assets are pro rated among the beneficiaries and the town's share is divided in accordance with the decree of distribution, between $15,000 and $18,000 will remain for the building of a hospital instead of the $30,000 provided for this purpose in the decree. Proportionally smaller sums will be available for furnishings and for the maintenance fund; if a smaller hospital is built, however, less will be needed for these purposes. The question as to the failure of the gift to the town may thus be determined on the basis of the construction fund alone.

[22] The evidence presented at the trial shows that the population of Kingsley, Iowa was 1,145 according to the 1940 census and that there had been no appreciable increase therein at the time of the trial. There was testimony that, because of the low construction costs and other advantages in the town, a hospital adequate for its normal needs could be built for about $15,000. The court found that there was no hospital in Kingsley, Iowa at the time of the death of the testator or at any time since. Although there was no express finding of fact as to whether this sum would be adequate, the trial court ordered that a lesser amount, based on the one-third limitations applied to charitable gifts, be made available to the town for this purpose. On full consideration of these facts, it must be concluded that the building of a smaller structure would substantially carry out the testator's intention. It is a reasonable modification of the

trust to enforce the gift for a smaller hospital rather than to allow the testator's intention to provide a hospital in the town to fail entirely. See Estate of Peabody, 154 Cal. 173, 178, 97 P. 184; Allen v. Nasson Institute, supra, 107 Me. at page 125, 77 A. 638; Jones' Unknown Heirs v. Dorchester, Tex.Civ.App., 224 S.W. 596, 604. Moreover, such a modification is in accord with the policy of the law in favor of charitable gifts. See Collier v. Lindley, supra; Village of Hinsdale v. Chicago City Missionary Society, supra, 375 Ill. at page 231, 30 N.E.2d 657; Zollman, loc. cit. supra, and cases there collected. The gift of the Town of Kingsley must, therefore, be sustained.

The order instructing trustees provides that the town shall have one year from the date that the order determining the amount distributable to the town shall have become final within which to acquire a site for the hospital and heating plant and "if it fails within said time to secure such site, then the bequest to it shall absolutely lapse and shall thereupon pass under the residuary clause of decedent's will." The decree of distribution provides in part that when all the bequests have been made the trust shall cease and all the rest, residue and remainder of the trust estate shall thereupon be given absolutely to Sarah M. Loring, the residuary beneficiary. The Braille Institute has raised the question as to how the funds are to be distributed in the event the town should fail to comply with the terms of the order. Although there is some ambiguity, the proper construction of the decree of distribution is that there is no remainder or residue until all the money gifts have been paid in full. See cases collected in 118 A.L.R. 352. In its memorandum opinion, the trial court so construed the decree when it held that, if the share of the town should become part of the residue, the Braille Institute should take its full gift. The same problem exists, however, with respect to the other beneficiaries. That part of the order instructing trustees is, therefore, modified by inserting the following provision: In the event the Town of Kingsley fails to take its share of the trust assets or fails to comply with this order within the time specified, the pro rata share of the Town of Kingsley shall be applied first to satisfy the money gifts to the other beneficiaries in full; any sum remaining after these gifts have been satisfied, shall be distributed to the residuary beneficiary, Sarah M. Loring.

The order instructing trustees is further modified, in accordance with this opinion, to delete therefrom the paragraph limiting the gifts to the Town of Kingsley and to the Braille Institute to one-third of the estate and providing that "* * * the bequests of specific sums to individuals should be paid in full and the balance or residue distributed to Sara M. Loring." In its place, is substituted the following provision: It is ordered, adjudged and decreed that upon distribution, the amount now available for distribution plus the amounts, if any, of overpayment of federal estate and California inheritance taxes (less any future administrative expenses) shall be distributed pro rata to the beneficiaries of the trust in proportion to the specific sums provided in the decree of distribution.

The order appealed from as modified herein is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 452

PEOPLE v. MANCHETTI.

Cr. 4741.

Supreme Court of California, in Bank.

Dec. 18, 1946.

1. Criminal law ⚿921, 922(3)

Where there was evidence to support guilty verdict but testimony of prosecuting witness was unusual, and evidence as to commission of crime and as to credibility of important witnesses was sharply conflicting, and trial was conducted in atmosphere of bitter animosity among witnesses who were members of prosecuting witness' family, and errors in respect to completion of cross-examination of witness and instruction calling attention to testimony of such witness may have influenced jury's verdict, fairness to defendant required new trial.

2. **Criminal law** ⚷641(1)

The refusal of request for continuance by attorney appearing on behalf of accused's counsel was not in itself denial of accused's right to be represented by counsel of his choice, for accused had no absolute right to be represented by particular lawyer. Const. art. 1, § 13.

3. **Criminal law** ⚷593

In determining whether continuance should be granted so that defendant can be represented by counsel of his choice, convenience of court and prosecution should be considered, and trial court should not prejudice defendant not responsible for his counsel engaging in trial of another case. Const. art. 1, § 13.

4. **Criminal law** ⚷1137(2)

A defendant cannot complain if he had opportunity to cross-examine witness and failed to exercise such opportunity. Code Civ.Proc. §§ 1846, 2050.

5. **Witnesses** ⚷283

Where attorney who was required to represent accused with less than one day in which to familiarize himself with case agreed to request of people's witness to be excused before cross-examination was completed for reason that witness appeared to be about to throw a fit and that attorney because of his unfamiliarity with case was not aware of probable great importance of witness' direct testimony, trial court's refusal to recall witness for completion of cross-examination after importance of witness' testimony became apparent was abuse of discretion.

6. **Criminal law** ⚷811(5), 823(12)

An instruction as to law which called particular attention to testimony of people's witness whom trial court refused to permit to be completely cross-examined was error, and such error was not corrected by another instruction that trial court was not expressing any opinion on weight of evidence or truth or falsity of any witness' testimony.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Dante Manchetti was convicted of robbery while armed with a deadly weapon, and he appeals.

Reversed.

Prior opinion, 169 P.2d 938.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty., and Charles S. Peery, Deputy Dist. Atty., both of San Francisco, for respondent.

SCHAUER, Justice.

[1] A jury found defendant guilty of robbery in the first degree committed while defendant was armed with a pistol. Defendant appeals from the judgment entered pursuant to the jury verdict and from an order denying his motion for a new trial. There is evidence to support the verdict, but the testimony of the prosecuting witness, victim of the asserted robbery, is, to say the least, unusual, and the evidence as to whether the crime was committed and also as to the credibility of the important witnesses is in sharp conflict. The trial was conducted in an atmosphere of bitter animosity among those witnesses who were members of the family of the prosecuting witness. In the circumstances certain errors complained of by defendant may well have influenced the verdict of the jury; certainly we cannot say that they did not have such effect. Therefore, fairness to defendant requires a new trial. People v. Kane, 1946, 27 Cal. 2d 693, 702, 166 P.2d 285, and cases there cited.

Defendant was convicted of robbing Rose Pesce on November 13 and 14, 1940. The testimony of Rose covers various incidents, including many asserted public offenses of defendant against the person and property of Rose, from 1929, when she first met defendant, until May, 1944 (a year prior to the trial of this action), when he "told me * * * go up to his attorney's office and have all this squashed, and I said, 'No.'" Such testimony is as follows: From time to time after Rose met defendant in 1929, they lived together as man and wife. At a time which does not appear, Rose became the operator of a house of prostitution. In 1939 "I got several beatings, very severe beatings" from defendant and on three occasions he obtained money from Rose by threats. "He says I was quite successful and I made a good deal of money, and he'd taught me everything I knew, and he was entitled to it because he taught me."

Rose further testified that on November 13, 1940, at about 11 a. m., defendant and one Pelozzari came to Rose's establishment in Benicia. Defendant demanded $1,500. Rose refused to give defendant money "and he pulled out a gun and slapped me [with the gun]." Pelozzari also produced a gun. Persons who lived and worked in the house came and went. Defendant repeated his demands and threats. About 10 p. m. Rose "finally couldn't stand it any longer, and I called my maid, and I said, 'Go see how much I have and give it to them.'" The maid handed defendant $500. Defendant and Pelozzari "said they were going to stay there until I gave them the rest of the money." Defendant, with Pelozzari, remained all night, reiterating his demands and threats. Twice during the night a private night watchman knocked at the door of Rose's establishment, as was his custom and duty; Rose or her maid came to the door and told him that "things were all right." Rose had a telephone and, as stated, other persons were in the house. But Rose did not summon aid because defendant threatened "to get my whole family. * * * He was going to run over my little niece and get my husband and beat them up." The next day (November 14, 1940) Rose, still in fear of bodily harm or death, drove to San Francisco in her car with Pelozzari, who kept his hand on his gun; defendant followed in his car. They went to a bank where Rose had a safe deposit box. Defendant accompanied her to the box. She took out $1,000 and handed it to defendant. Rose made no complaint to any employe of the bank because "If I had said anything they'd only come back and get me." She returned to her establishment and notified the parole board of the above events (defendant was on parole) but did not notify the police.

Rose testified that she next saw defendant "[a]round Christmas time" and that she did not see him again until July 4, 1941, when he came to her home armed with a gun and said, "Now, I'm off parole, * * * and from now on I'm boss; you'll do what I want. * * * You can't turn me in to the Parole Board any more." On July 8, 1941, defendant forced Rose, who was in fear of her life, to go to her bank in Berkeley and withdraw $1,200. With this money defendant bought an automobile. At about this time he beat her severely. She complained to the Berkeley police but "Nothing was done because he took me out of the state," on a trip across the country in the new car. Defendant "said he'd talked it over with his attorney, and that's the only way out, he'd have to take me out of the State so I couldn't testify on the other things he'd done to me." Rose further testified "[I] didn't know I was going East. I was knocked unconscious and I didn't come to until I came to in Salt Lake City." (But Rose also testified that before leaving for the East she took her dog to her sister-in-law to be cared for during her absence; she made no complaint of defendant's conduct to the sister-in-law "because we never got along.") Defendant and Rose stopped in various cities and visited relatives of Rose in Boston. They were absent from the state for about a month. An aunt of Rose returned with them to California. Throughout this time Rose, because of fear for the safety of her husband, made no complaint of defendant's conduct, except that she once telephoned to her uncle in Oakland concerning her predicament; the uncle did nothing about the situation.

The testimony of defendant and others is directly at variance with all salient portions of the above testimony of Rose, both as to the offense charged and as to subsequent conduct of defendant which, according to Rose, caused the delay in making complaint of that offense. Rose's maid corroborated her testimony as to the events of November 13, 1940. Rose's sister and sister-in-law testified that the maid did not live or work at the establishment on November 13 and 14, 1940; that they were employed there, doing housework, and were present on those dates; and that they did not see defendant, Pelozzari, or any men with guns. Rose's brother testified that his wife (the above mentioned sister-in-law) had never worked for Rose. The evidence as to other matters is similarly conflicting. For example, according to the testimony of defendant (and as corroborated by a San Francisco police officer), after defendant and Rose returned from their trip across the country in September, 1941, defendant learned that the Berkeley police, although they did not have a warrant, "would like to talk to Dante Manchetti." Defendant went to Berkeley and talked with the police and the district attorney concerning Rose's accusation "that I forced her at the point of a gun to go into a bank and draw out $1200 in Oakland to buy out the car * * * [The police, the district attorney, and the salesman who sold defendant the car] had a discussion, and he [the district attorney] started to laugh, and he said, 'You'd better go home.' * * * and that's the last I heard of that." Thereafter, defendant testified, Rose, "kept telling me all the time, 'I'll frame you if it's the last thing I do.'"

In the latter part of 1941, defendant left California. On December 15, 1941, defendant and Pelozzari were accused by indictment of robbing and kidnapping Rose on or about November 14, 1940. (Pelozzari appeared, was arraigned, and after seven continuances was released on his own recognizance on December 17, 1942. The disposition of the cause against Pelozzari does not appear.) In May, 1944, federal authorities brought defendant to California. According to defendant he then learned for the first time of the present charge. After sixteen continuances (one, at defendant's request, to plead; eight of the court's own motion; six by consent; one at the request of the People) trial commenced on May 24, 1945. On that day, on motion of the district attorney, the charge of kidnapping was dismissed.

Defendant first contends that he was, in substantial effect, arbitrarily deprived of the right to "appear and defend * * * with counsel" (Cal.Const., art. I, § 13) and, as a part of such contention, urges in particular that he was so deprived of the right to be represented by counsel of his choice. Relative to the mentioned contention the record shows the following: On April 24, 1945, the cause was continued for trial to May 23, 1945. On May 8, 1945, a case in the Superior Court of San Mateo County in which defendant's counsel, Mr. Coghlan, was appearing was continued to May 22. On Saturday, May 19, Mr. Dunning, a deputy district attorney, advised Mr. Coghlan that the present cause "was definitely going to proceed." Mr. Coghlan said that he could not go to trial on the 23d. On Monday, May 21, Mr. Coghlan and Mr. Dunning appeared before the presiding judge. Mr. Dunning stated that the People had "subpœnaed foreign witnesses who are presently within the jurisdiction of the city, and ready for trial," and, therefore, would not consent to a continuance. The presiding judge advised Mr. Dunning to telephone the San Mateo judge on behalf of Mr. Coghlan, explain the situation, and request a continuance of that matter. Such continuance was refused. On May 23, Mr. Dunning and defendant, unrepresented, appeared before the trial court. Mr. Dunning explained Mr. Coghlan's situation and stated that foreign witnesses for the People, "one from out of the State, and another from Los Angeles," were present; that because of the condition of the department calendar he had not called a jury for that day but had called one for the 24th. On May 24, Mr. Andrews, an attorney, appeared *for Mr. Coghlan,* again explained Mr. Coghlan's absence, said he was totally unfamiliar with defendant's case, and moved for a continuance. Mr. Elkington, deputy district attorney, opposed the motion. He said that defendant "became a fugitive" (a reasonable inference, although, as stated, defendant testified that he did not know of this charge when he left California); that "The District Attorney [after defendant's arraignment] had tried and tried to bring this case to trial" (an assertion not otherwise borne out by the record); and that "We have witnesses who have come from Los Angeles." (No witnesses from Los Angeles or from out of the state testified and there is no explanation by the People of the repeated assertions that such witnesses had been subpœnaed and were present.) A continuance was refused. The trial court said, "We will proceed with the selection of a jury, and then * * * the Court will take a reasonable recess to enable you to familiarize yourself with the facts of the case."[1] Defendant asked, "May I say something?" and the court replied, "No, you just sit down and follow the advice of your lawyer." A jury was selected and an adjournment taken to Friday, May 25. On May 25, Mr. Andrews expressly and defendant impliedly indicated their objections to Mr. Andrews' representing defendant but the court ordered Mr. Andrews to proceed with the trial and the order was obeyed. On Monday, May 28, Mr. Coghlan appeared, was substituted for Mr. Andrews, and the case was continued to Thursday, May 31, because the trial judge was ill. During the remaining four days of trial defendant was represented by Mr. Coghlan, the attorney of his choice.

[2, 3] The refusal of Mr. Andrews' request for a continuance in itself was not a denial of defendant's right to be represented by counsel of his choice for defendant had no absolute right to be represented by a particular attorney. It is clear, as the People urge and as this court stated in People v. Dowell, 1928, 204 Cal. 109, 113, 266 P. 807, 809, "That the courts cannot in every case await the convenience of some attorney before they can function. Reduced to its lowest terms, this would allow a popular attorney to have the courts marking time to serve his convenience." On the other hand, not only the convenience of court and prosecution but also the rights of persons accused of crime must be considered. The trial court should exercise care not to handicap to his prejudice a defendant who is not responsible for the fact that his counsel is engaged in trial of another case. (See Fricke, Criminal Procedure (1945), pp. 193–194.) Where this court has upheld the denial of a motion for continuance made on the ground that the attorney of defendant's choice was engaged in another trial, it has been careful to point out that defendant was given adequate opportunity to obtain other counsel. (People v. Goldenson, 1888, 76 Cal. 328, 341, 19 P. 161, where the case was continued for five days to allow new counsel appointed by the court to prepare the defense; disapproved on other grounds in People v. Stokes, 1894, 103 Cal. 193, 197, 37 P. 207, 42 Am.St.Rep. 102; People v. Russell, 1909, 156 Cal. 450, 455, 105 P. 416, where defendant refused the court's offer to appoint other counsel; People v. Dowell, 1928, supra, 204 Cal. 109, 113, 114, 266 P. 807, where the court told defendant himself, more than thirty days before the date set for trial, that he must be prepared to go to trial, and "No incident injuriously affecting the substantial rights of appellant is noted as having occurred due to the absence of Mr. Coghlan [counsel of defendant's choice]"; cert. den., 278 U.S. 660, 49 S.Ct. 7, 73 L.Ed. 568; People v. Dorman, 1946, 28 Cal.2d 846, 852, 172 P. 2d 686; see, also, People v. Whinnery, 1942, 55 Cal.App.2d 794, 798, 131 P.2d 33.)

Here, although it could be inferred that Mr. Coghlan had sufficient opportunity to arrange for his client's protection, there is nothing in the record to show that defendant sought to delay his trial or that he appreciated the situation until May 23, when he appeared, unrepresented, and the court stated that he should "get busy today and see that you are represented [tomorrow]." Furthermore, the court's rulings as to a continuance must be considered, not alone, but in connection with subsequent rulings concerning the testimony of the first witness for the prosecution. This witness, one Edwards, a soldier, testified at a time when, as the trial court knew, Mr. Andrews (assuming that he had been able to devote all his time to defendant's case) had had less than one day to prepare. Edwards was the sole witness as to the basic question of whether the crime charged had been committed, who was not connected with the operation of brothels or the family quarrels interjected into evidence. He gave damaging testimony on direct examination, then, after a few questions on cross-examination, stated that he was confused and was excused at his own request. Edwards' demeanor on the stand was such that the trial judge stated that he was apprehensive "that he [Edwards] might throw a fit." Mr. Andrews said that he had "No objection" to the witness being excused and did not (as he did in the case of other witnesses) expressly request that the privilege of recalling Edwards for further cross-examination be reserved. Thereafter, when the importance of Edwards' testimony became apparent, the trial court, basing its ruling on the ground that "Mr. Andrews cross-examined," refused either to recall Edwards for completion of cross-examination or to strike his testimony. Instead, the trial court gave an instruction which may well have caused the jury to give particular credence to Edwards' testimony. The cumulative effect of these rulings followed by this instruction requires a reversal.

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[1] Defendant argues at some length that Mr. Andrews, concededly an able attorney, could not adequately examine prospective jurors when, as he informed the court, he had not had oportunity even to learn "specifically what the charges are." Defendant is correct in his assertions that knowledge of the background of a case is important in selecting a jury. But he has not attempted to show, otherwise than by inference from the basic facts, that he was prejudiced in this respect. At his request the record on appeal does not include a transcript of the voire dire examination.

Edwards' testimony on direct examination was given with considerable hesitance although he was permitted to refresh his recollection by reading a transcript of his testimony before the grand jury. He testified that he rented from Rose a room near her "main establishment"; that on the night of November 13, 1940, he saw and heard Rose, her maid, defendant and Pelozzari; that defendant said, "I want the money now. * * * If we don't get it one way we'll get it another"; that defendant had a gun in his hand; that Rose said, "I haven't got it"; that he (the witness) saw and heard no more of the transaction for "it was none of my business and I left." On cross-examination the witness immediately became confused. Defendant's counsel read a portion of the witness' testimony before the grand jury and asked if that had been his testimony. Edwards replied, "Sir, that was four years ago. I don't remember. I have been overseas, and there's a lot of things I don't remember. I don't know why I'm up here sometimes." Court and defense counsel questioned him briefly as to his recollection and he said, "All this confusion, sir, I am rather hazy. * * * I'd like to be excused." The deputy district attorney stated, "I'm afraid that is not possible," but defendant's counsel said, "No objection, your Honor." The court questioned Edwards further and Edwards testified that he was "shell-shocked." The court excused the witness.

On the third day of the taking of evidence Mr. Coghlan asked that Edwards be recalled for cross-examination. At this time the prosecution's case in chief was complete and the importance of Edwards' testimony had become obvious. The court said, "I have completely excused that witness. * * * Mr. Andrews cross-examined. * * * That witness was a shell-shocked soldier, who should not have testified." Mr. Coghlan then moved that the testimony of Edwards be stricken and the trial court denied the motion. This was in the presence of the jury.

Thereafter, Mr. Coghlan was permitted to argue, outside the presence of the jury, his motion to strike the testimony of Edwards. He urged that defendant was "deprived of his right to cross-examine after injurious facts were adduced upon his direct examination." The court stated, "I don't think that is the point involved here, for this reason: The [witness] was cross-examined by Mr. Andrews. Mr. Andrews was the one that made the suggestion that he be excused. * * * Now, why aren't you sufficiently protected by reading that [Edwards' testimony that his recollection was hazy, etc.] to the jury, indicating to the jury the condition of this man in your argument. * * * The jury saw this boy and he appeared to be very shaky and very confused on the stand. * * * As a matter of fact, I was very apprehensive, I thought he might throw a fit on the stand." The trial judge further suggested that defendant's counsel "prepare the instruction that the jury is the sole judge of the weight of the testimony and the appearance of this witness Edwards should be taken into consideration by them, together with the testimony he gave." He denied the motion to strike, he said, because "the witness was competent to testify and the weight to be given to his testimony is for the jury to determine."

The repeated assertion of the trial judge that "Mr. Andrews cross-examined" is not, in a reasonable and full measure construction of the term, supported by the record. The only testimony of Edwards which defendant tested on cross-examination was that, during the short time the witness observed the transaction, defendant had a gun and said, "If we don't get it one way we'll get it another." And the only development on cross-examination as to this testimony was that the witness was not sure whether defendant or Pelozzari had the gun and uttered the threat. Since, according to Rose, both defendant and Pelozzari displayed guns and uttered threats for hours, the uncertainty of the witness as to this particular point was of little importance. Although such meagre cross-examination as had taken place before the witness asked to be excused indicated that Edwards' general recollection was "hazy" it did not test his recollection specifically as to such vital, controverted matters (related by Edwards on direct examination) as the presence of the witness himself and of defendant, Pelozzari and Rose's maid on November 13, 1940, and as to whether, in fact, guns were displayed and threats made.

In a situation such as that which arose when Mr. Andrews attempted to cross-examine Edwards, where "the opposing party is deprived of the opportunity of a cross examination without fault upon his part, as in the case of the illness or death of a witness after direct examination, it is generally held that he is entitled to have the direct testimony stricken from the record." 28 R.C.L., p. 600; Henderson v. Twin Falls County (1938), 59 Idaho 97, 80 P.2d 801, 802, 806. According to Professor Wigmore, "Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss." (5 Wigmore, Evidence (3d Ed.) p. 110; the cases collected in note 4, pp. 110, 111, show how "Courts differ in their treatment of this difficult situation"; cf. People v. Russell (1926) 80 Cal. App. 243, 246, 251 P. 699, and Chamberlain v. Chamberlain (1931), 114 Cal.App. 591, 594-595, 300 P. 100.

[4, 5] The People emphasize that Mr. Andrews said that he had no objection to Edwards' being excused and urge that he indicated that he considered his opportunity for cross-examination sufficient. Of course defendant cannot complain if he had opportunity to cross-examine and failed to exercise his right. (Code Civ.Proc. §§ 1846, 2050; Wigmore, op. cit., pp. 111, 51.) But here it seems clear that the reason Mr. Andrews agreed to Edwards' request to be excused was that it appeared that the witness "might throw a fit"; furthermore, that because of Mr. Andrews' unfamiliarity with the case he was not at that stage of its development aware of the probable great importance of the direct testimony. The trial court when the matter was next brought to its attention by Mr. Coghlan knew the importance of Edwards' testimony and knew that Mr. Andrews at the time of such testimony had been required to represent defendant with less than one day in which to familiarize himself with the facts and background of the case. In the circumstances its failure even to attempt to secure to defendant his right of adequate cross-examination was an abuse of discretion.

[6] Instead of recalling the witness or striking out his testimony the trial court gave an instruction (not the instruction prepared by defendant at its suggestion) that the jury "are the sole judges of the weight to be given to the evidence of any witness who may have testified in this case. And in this connection I desire to call to your attention the testimony of the witness David T. Edwards. I charge you that you are the sole judges *or* the worth or value or credibility of the testimony of this witness, and of every other witness." This does not purport to be a comment on the evidence. It is an instruction as to law which calls particular attention to the testimony of Edwards. We agree with de-

fendant's contention that the instruction is erroneous. It is impossible to know what effect the naming of this incompletely cross-examined prosecution witness had upon the jury. They may have received the impression that his testimony deserved especial regard. We cannot, in view of the entire record, say that this possible erroneous impression was corrected by a previous instruction that "the Court is not expressing, nor does the Court desire to express, any opinion upon the weight of the evidence or any part of it, or on the truth or falsity of any witness' testimony."

For the reasons above stated the judgment and order appealed from are reversed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the judgment of reversal, but upon the sole ground that the trial judge abused his discretion in denying defendant's motion for a continuance of his trial. I think it is clear that we have in this case a much less aggravated case of an arbitrary denial of the right of counsel to the defendant in a criminal case than existed in People v. Dorman, 28 Cal.2d 846, 172 P.2d 686, yet this court, in effect, though not expressly, holds that there was an abuse of discretion in denying a continuance in this case. However I believe that in this case as well as in the Dorman case the trial court abused its discretion if, indeed, it did not violate defendant's constitutional rights.

According to the opinion prepared by Mr. Justice Schauer the prosecuting attorney represented to the trial court that foreign witnesses had been subpœnaed and were present, but none were called during the trial of the case. Presumably on the basis of that representation the continuance was refused. While it is true that that factor was not involved in the Dorman case, in the instant case there had been (contrary to the Dorman case) a continuance of a month and the defense attorney may have been under a duty to arrange his time in a fashion that he would not have conflicting trial dates or withdraw from the case. In both cases the defendant was forced to go to trial without prepared counsel. In the instant case defendant at least had the prepared counsel of his choice for the major portion of the trial, while in the Dorman case he had an unprepared counsel for the *entire trial.* Moreover it is said by Justice Schauer "There is nothing in the record to show that defendant sought to delay his trial or that he appreciated the situation until May 23, when he appeared, unrepresented, and the court stated that he should 'get busy today and see that you are represented [tomorrow].'" In the Dorman case there was also *nothing in the record to show the defendant sought to delay the trial.* As pointed out in my dissent therein and which is not disputed: "Likewise, by analogy in the instant case, we should indulge in the presumption that there was no scheme or plan by appellant to secure a postponement of the trial by the device of changing counsel. Otherwise the fundamental right is whittled away with the knife of a mere supposition that persons accused will impose upon the courts. * * * I think it is obvious that the trial court was not sufficiently solicitous in protecting the constitutional right of the appellant to the assistance of counsel as that right is defined in the Glasser and Powell cases. It used as a weapon to prevent appellant from having a counsel of his own selection, the threat of either not making such a choice or taking an unprepared counsel by the device of denying a continuance, all upon *the supposition* that appellant was attempting to obtain an unjustified delay in the trial." (Italics added.) People v. Dorman, supra, 28 Cal.2d at page 862, 172 P.2d at page 696. Hence there is no basis for holding, at least by implication in this case, that defendant was deprived of prepared counsel of his own choice by the device of refusing a continuance, but that the defendant in the Dorman case was not. As above stated, the arbitrary action of the trial judge in denying a continuance in the Dorman case was much more aggravated than in the case at bar.

Be that as it may, there can be no doubt whatsoever that the trial court abused its discretion in denying a continuance in the instant case. Defendant's counsel was absent for a portion of the trial because he was engaged in another trial. Defendant was wholly without representation by counsel of his choice during a portion of the trial. It was through no fault of defendant's counsel that he was absent and engaged in another trial. The other case had been set for trial and he was unsuccessful in his endeavor to obtain a postponement thereof. It may be inferred that the prosecuting attorney misrepresented the facts to the court in opposing the continuance. It may be true generally that, standing alone, the engagement of defendant's counsel in another trial is not sufficient to compel the trial court to grant a continuance, but in such event *it must appoint counsel to represent defendant and give the new counsel time to prepare the case* rather than forcing the defendant to trial without counsel—or with counsel who concededly knew nothing of the case and who is as unwilling to try it as defendant is to have him do so. In the case at bar, at least in the first instance, defendant was even deprived of the opportunity to make his protest. Thompson v. Thornton, 41 Cal. 626; People v. Logan, 4 Cal. 188; 23 C.J.S., Criminal Law, §§ 980, 982, pp. 322, 326; see People v. Russell, 156 Cal. 450, 105 P. 416; People v. Warren, 130 Cal. 678, 63 P. 87; People v. Goldenson, 76 Cal. 328, 19 P. 161. In the instant case there may have been the appointment of counsel (Mr. Andrews) in the absence of defendant's counsel, but not only was he not given time for preparation but the arrangement was unsatisfactory to both client and attorney.

In my opinion the only sound basis for a reversal of the judgment in this case is that the trial judge abused his discretion in denying defendant's motion for a continuance of the trial to enable him to obtain counsel of his choice prepared to conduct his defense. The majority opinion states, but fails to squarely decide this issue. This failure is no doubt due to its inability to distinguish this case from the Dorman case, *supra*. Plainly, all of the distinguishing features of the two cases are in favor of the holding of the trial court in the case at bar, and if the decision of this court in the Dorman case is sound, the judgment in the case at bar should be affirmed.

The refusal of the trial court to permit defendant to recall the witness Edwards for further cross-examination, was clearly not reversible error. The witness had been excused by defendant's counsel (Andrews) without reservation, and he was not in attendance or available as a witness at the time of the request. Certainly, denial of a request to recall a witness under such circumstances cannot constitute prejudicial error requiring the reversal of a judgment in a criminal case.

The holding of the majority opinion, that the refusal to permit the recall of Edwards for further cross-examination constituted prejudicial error, is based upon the assumption that Mr. Andrews would not have excused Edwards without reservation had he been prepared to try the case, or rather that if Mr. Coghlan would not have done so because he knew the importance of Edwards' testimony. But this amounts to nothing more than saying that if the trial court would have granted a continuance so that Mr. Coghlan or some other attorney prepared to try the case had been representing defendant from the beginning of the trial, the witness Edwards would not have been excused until he had been subjected to a thorough cross-examination. In other words, the basis of all the error complained of was the refusal of the trial court to grant a continuance of the trial.

I can see no escape from the proposition that if the trial court properly denied the continuance, it likewise properly denied the request to recall the witness, as the latter request was based upon the unpreparedness of Mr. Andrews to try the case, which was due to the refusal of the court to grant a continuance.

In the Dorman case, *supra*, this court affirmed a judgment of conviction of the crimes of murder, kidnapping and robbery against a 19-year-old boy, who was a sergeant in the United States Army, where the attorney of his choice had but two days to prepare for trial and the public defender who had been previously appointed admitted that he was not prepared to try the case. The trial court nevertheless denied defendant's motion for a continuance even for one week, and a majority of this court upheld this arbitrary action. I insist that if this is good law, the judgment in the case at bar should be affirmed. However, I am convinced that such decisions violate both the spirit and letter of our constitutional guarantees, and that this judgment should be reversed.

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77 Cal.App.2d 26

A. GREGORY, Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

Civ. 3445.

District Court of Appeal, Fourth District, California.

Dec. 16, 1946.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 174 P.2d 863.

James W. Hickey, Inheritance Tax Attorney and Raymond G. LaNoue, Deputy Inheritance Tax Attorney, both of Sacramento, and C. G. Kolts, of Los Angeles, and J. D. Lear, Assistant Deputy Inheritance Tax Attorneys, of Sacramento, for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

PER CURIAM.

Plaintiff has petitioned for a rehearing on two grounds: first, because this court did not decide the question of whether plaintiff was entitled to recover interest on the amount overpaid by him; and second, because the opinion does not specifically limit its holding to family corporations.

The question of whether or not interest was collectible, was not thoroughly briefed and the members of this court did not, and do not now, regard it as necessary for them to undertake the labor of briefing it, as the cause must be referred back to the trial court for further action.

What is said in an opinion relates solely to the facts of the case being decided and is limited by those facts. We had before us a corporation in which all the stock was owned by members of a family. Necessarily, the decision related only to such a corporation and to no other. To obviate any uncertainty, we here state that the decision can be applied only to such family corporations.

With this explanation, the petition for rehearing is denied.

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29 Cal.2d 332

WILKINS v. CITY OF SAN BERNARDINO et al.

L. A. 19148.

Supreme Court of California, in Bank.

Dec. 3, 1946.

Hearing Denied Dec. 23, 1946.

1. Municipal corporations 🔑601

Zoning ordinances which are reasonable in object and not arbitrary in operation constitute justifiable exercise of police power, and establishment, as part of comprehensive plan, of districts devoted to strictly private residences or single-family dwellings, from which are excluded business or multiple dwelling structures, is a legitimate exercise of police power.

2. Municipal corporations 🔑122(2)

Where property owner did not contend that zoning ordinance as a whole was immaterial but only that application thereof to his property was unreasonable, court would assume, in accordance with rule that every intendment is in favor of validity of zoning ordinance, that ordinance as a whole was proper exercise of police power and was to promote public health, safety, morals, and general welfare.

3. Municipal corporations 🔑63(1), 626

A city cannot unfairly discriminate against a particular parcel of land, and courts can properly inquire as to whether the scheme of classification contained in zoning ordinance has been applied fairly and impartially in each instance, but mere fact that some hardship is experienced is not material.

4. Municipal corporations 🔑620

An individual cannot complain of incidental injury arising out of municipality's exercise of police power, if power is exercised for proper purposes of public health, safety, morals, and general welfare, and if there is no arbitrary and unreasonable application in the particular case.

5. Municipal corporations 🔑122(2)

A property owner asserting that zoning ordinance is unreasonable as applied to his property or that change in conditions has rendered application of ordinance unreasonable must produce sufficient evidence from which court can make such findings as to the physical facts involved as will justify court in concluding as matter of law that ordinance is unreasonable and invalid, and property owner must show abuse of discretion of zoning authorities and that there has been unreasonable exercise of police power.

6. Municipal corporations 🔑63(2)

Every intendment is in favor of validity of exercise of police power, and even though court might differ from determination of legislative body, if there is reasonable basis for belief that establishment of strictly residential district has substantial relation to public health, safety, morals, or general welfare, zoning measure will be deemed to be within police power.

7. Municipal corporations 🔑63(2)

The courts cannot write zoning laws and cannot say that legislative body has erred in drawing lines of zoning districts or in restricting territory devoted to business or to multiple dwellings, unless there is clear showing that Legislature has abused its discretion by making restrictions which are unreasonable.

8. Municipal corporations 🔑601

Zoning ordinances are invalid where they attempt to exclude and prohibit existing and established uses or businesses that are not nuisances, and where restrictions create monopoly, and where use of adjacent property renders land entirely unsuited to or unusable for only purpose permitted by ordinance, and where small parcel is restricted and given less rights than surrounding property.

9. Municipal corporations 🔑601

A municipal legislative body can determine whether business island permitted by zoning ordinance in residential district should be enlarged, and mere fact that owner may enjoy greater benefits or that his property will be enhanced in value if the size of islands is increased cannot entitle him to compel allowance of such increase in size.

10. Municipal corporations 🔑601

Zoning necessarily involves boundary problems and, when spot zoning is permitted in a residential district, the legislative body must determine where boundary is to be placed, attempting as far as possible to minimize resulting inconveniences, and such determination can be attacked only if there is no reasonable basis therefor.

11. Municipal corporations 🔑121

A property owner, who deliberately violated zoning ordinance restricting area to single family dwellings by erecting multiple dwelling on property adjacent to small business zone within larger residential zone, would not be permitted to benefit from his own wrongdoing, and could derive no support from finding that the apartments in his building were more adaptable and more useful for multiple dwelling purposes than for a single family dwelling. Civ.Code, § 3517.

12. Municipal corporations 🔑121

The constitutionality of zoning ordinance or of its application to particular property must be determined upon facts and conditions as they existed prior to time plaintiff proceeded in disregard of ordinance, and court must wholly ignore all conditions which resulted from landowner's action. Civ.Code, § 3517.

13. Municipal corporations ⚷601

Where property owner deliberately violated zoning ordinance restricting area to single family dwellings, by errecting multiple dwelling on property adjacent to small business zone within larger residential zone, finding that use of property for multiple dwelling purposes was in enjoyment of substantial property right of owner was an improper conclusion of law.

14. Municipal corporations ⚷601

Where property owner deliberately violated zoning ordinance restricting area to single family dwellings by erecting multiple dwelling on property adjacent to small business zone within larger residential zone, finding that use of property for multiple dwelling purposes did not impede, hinder, or interfere with attainment of objectives of zoning ordinance did not authorize property owner to so use the property in absence of facts showing that ordinance was unreasonable or invalid as applying to owner's property.

15. Municipal corporations ⚷601, 625

The mere existence of some adjacent property devoted to other uses does not destroy character of restricted property for residential purposes or render zoning restriction arbitrary.

16. Municipal corporations ⚷601

The use of nearby property for multiple dwelling purposes did not authorize property owner to erect multiple dwelling on property zoned for single family dwellings and adjacent to small business zone within larger residential zone.

17. Municipal corporations ⚷601

The presence of unsightly multiple dwellings on property owner's property in small business zone within larger residential zone did not authorize property owner to erect multiple dwelling on adjacent property zoned for single family dwellings.

18. Municipal corporations ⚷601

The increase in land values by reason of development of small business within larger residential zone did not authorize extension of business zone to adjoining property in the larger residential zone.

19. Municipal corporations ⚷601

Housing shortage may justify a city or court in temporarily suspending zoning ordinance restricting area to single family dwellings during the emergency, but does not warrant suspension of ordinance for all time to come.

20. Municipal corporations ⚷122(4)

Where property owner deliberately violated zoning ordinance restricting area to single family dwellings by erecting multiple dwelling on property adjacent to small business zone in larger residential zone, evidence was insufficient to support findings that enforcement of ordinance would be oppressive, confiscatory, and unreasonable restriction of owner's property rights or an unwarranted and unreasonable invasion of owner's property rights or that public health, peace, morals, safety, or welfare did not require that owner be prohibited from using dwelling as multiple dwelling.

CARTER, SHENK, and SCHAUER, JJ., dissenting.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action for declaratory relief with respect to a zoning ordinance by A. L. Wilkins against the City of San Bernardino and others. From a judgment granting the plaintiff injunctive relief, the defendants appeal.

Reversed.

Prior opinion 162 P.2d 711.

H. R. Griffin and Martin J. Coughlin, both of San Bernardino, for appellants.

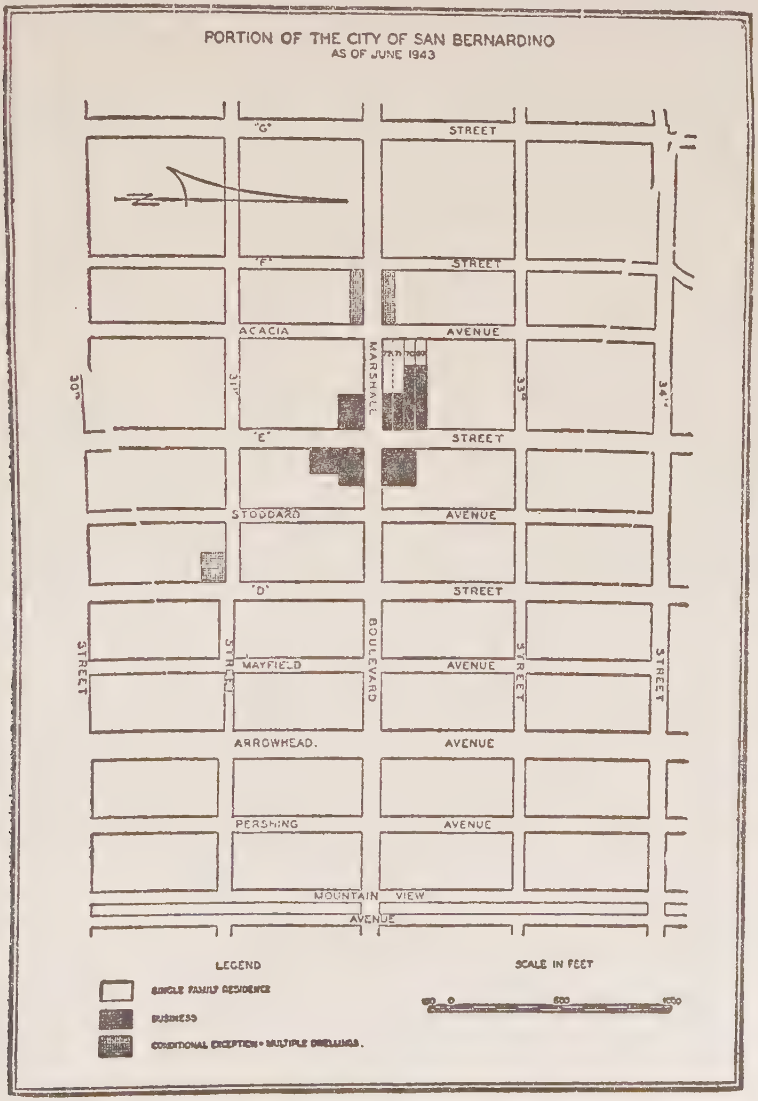
E. John Eriksson and Homer M. Bail, both of San Bernardino, for respondent.

GIBSON, Chief Justice.

Plaintiff sought declaratory relief, claiming that the zoning ordinance of the city of San Bernardino was unreasonable and invalid as applied to the west 112 feet of his property because that portion was placed in a single family dwelling zone. The remainder of this property is located in a small or "spot" business zone which is in the center of a large residential district, zoned for single family dwellings. Plaintiff, in substance, is attempting to obtain an extension of one arm of this small business zone by judicial decree, contrary to the legislative determination by which the boundaries of the zone were established. The defendants appeal from a judgment sustaining plaintiff's claims and enjoining enforcement of the ordinance as it affects the property in question.

The accompanying map has been prepared in order that the facts may be more readily understood:

It is based on the city zoning map, exhibit "C," with the addition of certain markings, such as lot numbers and lines to indicate the boundaries of the lots. The property involved in this case is the west 112 feet of lots 69 and 70 in the block bounded by Acacia Street on the west, by 33d Street on the north, by E Street on the east and by Marshall Boulevard on the south. This block was originally divided into lots 50 feet wide, each of which ran the length of the block (about 394 feet) from Acacia Street on the west to E Street on the east. Starting on the southerly side, the first four lots are numbered 72, 71, 70 and 69. Plaintiff owns the whole



PORTION OF THE CITY OF SAN BERNARDINO
AS OF JUNE 1943

"G"
STREET
"F"
STREET
ACACIA
AVENUE
MARSHALL
72 71 70 69
30th
31st
33d
34th
"E"
STREET
STODDARD
AVENUE
"D"
STREET
STREET
STREET
MAYFIELD
BOULEVARD
AVENUE
STREET
STREET
ARROWHEAD.
AVENUE
PERSHING
AVENUE
MOUNTAIN VIEW
AVENUE
LEGEND
SINGLE FAMILY RESIDENCE
BUSINESS
CONDITIONAL EXCEPTION • MULTIPLE DWELLINGS.
SCALE IN FEET
100 0 500 1000

of lots 69 and 70, and the easterly portion of lots 71 and 72, as well as other property bordering on the intersection of Marshall Boulevard and E Street. The portions of lots 71 and 72 owned by plaintiff, and all of lots 69 and 70 except the westerly 112 feet, were zoned for business. Plaintiff had constructed a business building on his portion of lots 71 and 72, and had erected multiple dwellings and garages on the middle portions of lots 69 and 70 (east of the disputed westerly 112 feet).

According to the record there are only three other sections in the immediate vicinity (each being but a fraction of a block) which are zoned to permit multiple dwellings. Plaintiff's lots adjoin an area at the intersection of Marshall Boulevard and E Street which is "spot" zoned to permit business uses, but on the other three sides all contiguous property is zoned as residential; and, except as noted, all the surrounding property for a number of blocks is likewise zoned for and exclusively devoted to single family dwellings. (See map.)

In April, 1942, after two applications for rezoning had been denied as to the westerly 112 feet, plaintiff applied for a building permit for multiple dwellings on this property, and this application was also denied because the property was not zoned for such structures. In June, 1942, he applied for and obtained permits to erect *single family* two-story dwellings and garages on the west 112 feet of these lots. The plans submitted with the applications showed *single family* dwellings but instead of following the plans he erected two *multiple* family units, each with an apartment and garages on the first floor and two apartments on the second floor. This action was admittedly in violation of the building permits and the zoning ordinance, and it clearly appears that the violations were deliberate and willful.

The trial court made a number of findings, some more in the nature of conclusions of law, to the effect that the use of the buildings for multiple dwelling purposes is in the enjoyment of a substantial property right of plaintiff; that such a use is not detrimental to health, safety, morals or welfare; that such use does not impede, hinder or interfere with the attainment of the objectives of the zoning ordinance; that the four apartments are so placed and erected that they are more adaptable and more useful for multiple dwelling purposes than for single family dwellings in that they adjoin other property now used for business and commercial purposes; that the enforcement of the ordinance would be an oppressive, confiscatory and unreasonable restriction on plaintiff's property rights; that multiple dwelling status appears to exist on both sides of Marshall Boulevard between Acacia and F Streets; that on Marshall Boulevard between Acacia and E Streets (lots 71 and 72) there are four frontages, each occupying less than the 5,000 square feet required by another ordinance for single family dwellings; that it is impracticable to maintain and limit the use of the westerly 112 feet of lots 69 and 70 to a single family classification; that no consideration of public health, peace, morals, safety or welfare requires that plaintiff be prohibited from using the structures as multiple dwellings; that the apartment buildings upon the middle portion of lots 69 and 70 are unsightly and no ornament to that locality; that the extension of those buildings upon the west 112 feet of those lots presents a decided improvement in the general view from the Acacia Street side; that the land values have increased because of the development of a community business center; and that there is a shortage of housing facilities in the city.

The defendants contend that the findings do not support the judgment and are not supported by the evidence; that the existence of adjoining business property does not invalidate the zoning ordinance; that the presence of nearby boulevards and nonconforming uses is immaterial, as is the existence of a housing shortage in the city; that plaintiff cannot claim any rights based on his violation of the ordinance, and hence cannot claim that it is impracticable to use the buildings as single family dwellings; that every intendment is in favor of the constitutionality of zoning ordinances; and that there is so oppressive, confiscatory or unreasonable restriction on plaintiff's property rights. The plaintiff claims that the judgment is amply supported by the findings; that the sufficiency of the evidence cannot be questioned in view of the facts that the trial judge viewed the premises and that this constitutes additional and independent evidence; that whether or not the property has become unsuitable and impracticable for use for single family dwellings presents a question of law for the court; and that judicial notice may be taken of changing conditions and matters of common knowledge in the city, such as the shortage of housing facilities.

[1] It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, and that the establishment, as part of a comprehensive and systematic plan, of districts devoted to strictly private residences or single family dwellings from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power. See Jones v. City of Los Angeles, 211 Cal. 304, 307, 295 P. 14; Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479.

[2-4] In the present case, there is no contention that the zoning ordinance as a whole is invalid, but only that its application to part of plaintiff's property is unreasonable, and hence we must assume, in accordance with the rule that every intendment is in favor of the validity of such ordinances, that the enactment as a whole is a proper exercise of the police power and adapted to promote the public health, safety, morals and general welfare. This being so, the sole question is whether the application of the ordinance to plaintiff's property is so oppressive and unreasonable as to justify the granting of relief, or whether there was any reasonable justification for the legislation as applied to plaintiff's property so as to make the action of the city, in denying plaintiff's applications for rezoning, a legitimate exercise of the police power. A city cannot unfairly discriminate against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance. Reynolds v. Barrett, 12 Cal.2d 244, 251, 83 P.2d 29. But the mere fact that some hardship is experienced is not material, since "Every exercise of the police power is apt to affect adversely the property interest of somebody." Zahn v. Board of Public Works, 195 Cal. 497, 512, 234 P. 388, 394. It is implicit in the theory of police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals and general welfare, and if there is no arbitrary and unreasonable application in the particular case.

[5, 6] Where it is claimed that the ordinance is unreasonable as applied to plaintiff's property, or that a change in conditions has rendered application of the ordinance unreasonable, it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, as a matter of law, that the ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power. See Rehfeld v. City, etc., of San Francisco, 218 Cal. 83, 85, 21 P.2d 419. Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. Acker v. Baldwin, 18 Cal.2d 341, 344, 115 P.2d 455; Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388; see Otis v. City of Los Angeles, 52 Cal. App.2d 605, 614, 126 P.2d 954.

In affirming the judgment of this court in Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, where the city council concluded that the public welfare would be promoted by restricting a certain district which included the plaintiff's property, the United States Supreme Court said, "It is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." Zahn v. Board of Public Works, 274 U.S. 325, 328, 47 S.Ct. 594, 595, 71 L.Ed. 1074.

[7] The courts cannot write the zoning laws and cannot say that the legislative body has erred in drawing the lines of the districts, or in restricting the territory devoted to business or to multiple dwellings, unless there is a clear showing of abuse of legislative discretion, i. e., that the restrictions are unreasonable: As stated in Miller v. Board of Public Works, 195 Cal. 477, 493, 495, 234 P. 381, 387, 38 A.L.R. 1479, "The man who is seeking to establish a permanent home would not deliberately choose to build next to an apartment house, and it is common experience that the man who has already built is dissatisfied with his home location and desires a change. * * * Somewhere the line of demarcation must be drawn, and it is primarily the province of the municipal body to which the zoning function is committed to draw that line of demarcation, and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested in the absence of a clear showing of an abuse of that discretion. In short, as previously indicated, we are not permitted to substitute our judgment for the legislative judgment."

[8] An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; see Biscay v. City of Burlingame, 127 Cal.App. 213, 15 P.2d 784. 2. Where the restrictions create a monopoly. In re White, 195 Cal. 516, 234 P. 396; Wickham v. Becker, 96 Cal.App. 443, 274 P. 397; Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78. 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93. 4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an "island" in the middle of a larger area devoted to other uses. Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29; see Hagenburger v. City of Los Angeles, 51 Cal.App. 2d 161, 124 P.2d 345; Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308. There is no claim that the present case falls within the first two categories, and it clearly appears that it does not come within either of the others, but instead presents the exact opposite of the fourth class.

An examination of the facts in Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P. 2d 93, indicates clearly that the present case has nothing in common with that case. In the Skalko case, the twenty-four hour operation of an adjacent cannery, with its accessories, the existence of heavy automobile and truck traffic in front of plaintiff's property day and night, and the frequent operation of a nearby railroad, which hauled freight cars to the cannery at all hours, rendered the property entirely unsuited to and unusable for the *only* purpose permitted by the ordinance. Such is not the case here, and there is no finding or conclusion of law to that effect, nor are there any findings as to the existence of any physical facts which would justify the court in making such a conclusion. On the contrary the court merely concludes that the new buildings are more adaptable to use for multiple dwelling purposes and that it would be impracticable to use them for single family dwellings. Incidentally it should be noted that the court does not find that there would have been any impropriety or unreasonableness in applying the ordinance to the property as it existed *before* plaintiff built the new buildings, but deals solely with conditions existing after plaintiff had proceeded in disregard of the ordinance.

[9, 10] Likewise, the present case does not come within the fourth class listed above. So-called "spot" zoning results in the creation of two types of "islands." As pointed out above, the objectionable type arises when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of "island" results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more "spots" in the district. It is the second type of "island" that is presented in this case, and if there is any discrimination, it is in *favor* of the "island" since it may be devoted to a greater number of uses than the surrounding territory. It is clearly within the discretion of the legislative body of the city to determine whether such an "island" should be enlarged or not, and the mere fact that the owner may enjoy greater benefits, or that his properperty will be enhanced in value, if the size of the island is increased, cannot entitle him to compel the allowance of such increase in size. Rehfeld v. City, etc., of San Francisco, 218 Cal. 83, 21 P.2d 419; see Otis v. City of Los Angeles, 52 Cal. App.2d 605, 126 P.2d 954; Kort v. City of Los Angeles, 52 Cal.App.2d 804, 127 P.2d 66; Rubin v. Board of Directors, 16 Cal. 2d 119, 104 P.2d 1041. Zoning necessarily involves boundary problems and, when "spot" zoning is permitted in a residential district, the legislative body must determine where the boundary is to be placed, attempting, as far as possible, to minimize the resulting inconveniences. This is essentially a legislative problem, and the determination may be attacked only if there is no reasonable basis therefor. Often there may be little difference in the character of the property on either side of the line, but such a showing will not justify a judicial alteration or extension of the boundaries. If an owner could compel the extension of the boundaries of the "island," by any such showing, then the next adjoining owner in turn could likewise make the same kind of a showing and obtain another extension of the "island" to his property, and in a short time there would be an end to the effectiveness of all zoning legislation.

[11] In considering the plaintiff's contentions it must be remembered, first, that he does not occupy the position of one whose property is unduly restricted as to use in comparison with the surrounding territory, but instead he is simply seeking to enlarge an "island" which is zoned for additional uses; and, second, that many of the alleged hardships of which he complains are admittedly the result of his own actions in violating the duly enacted ordinances of the city. "No one can take advantage of his own wrong" (Civ.Code, § 3517), and plaintiff should not be permitted to benefit from his own wrongdoing. Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455. For instance, he cannot derive any support from the finding that the four new apartments are more adaptable and more useful for multiple dwelling purposes than for single family dwellings. If true, this is the result of plaintiff's deliberate and willful violation of the zoning ordinance.

[12] The constitutionality of the ordinance or of its application to particular property must be determined upon the basis of the facts and conditions as they existed prior to the time plaintiff proceeded in disregard of the ordinance, and the court must wholly ignore all conditions which resulted from the plaintiff's actions. If this were not so, then any landowner could violate a zoning ordinance with impunity, secure in the knowledge that, by just going far enough, by devoting his land to unrestricted uses, and by creating a situation in which enforcement would result in hardship to him, he could obtain a judgment that the ordinance is unconstitutional as applied to the *then existing* circumstances as changed by his actions. While a plaintiff may ignore an unconstitutional ordinance, this does not, and cannot, mean that a person may proceed con-

trary to an ordinance and then claim that it is unconstitutional because of the results and effects *of his own actions* in disregard of the ordinance.

In this case, it appears that the trial court was improperly influenced by the conditions which resulted from plaintiff's actions in disregard of the ordinance. This is indicated by the trial court's statement that the constitutionality of the ordinance must be determined "as it applies to plaintiff under conditions now existing," and by the finding to the effect that the use of the newly erected buildings for multiple dwelling purposes is in the enjoyment of a substantial property right of plaintiff; that they are so placed and erected that they are more adaptable and more useful for multiple dwelling purposes than for single family dwellings; that it is impracticable to limit the use of the property to single family dwellings; and that the new buildings present a decided improvement in the general view. If such findings, or the other findings in this case, would uphold a judgment of unconstitutionality of the ordinance, it necessarily follows that no such ordinance would be enforceable if the landowner acted first and devoted his land to forbidden uses. There is, and there can be, no legal principle which will thus place a premium on deliberate violation of law, and allow the violator to profit by his own wrong.

Plaintiff places great reliance on the fact that the trial judge viewed the premises, and he claims that what the judge saw is independent and additional evidence, and that the sufficiency of the evidence cannot be questioned. This may be admitted for the sake of argument, since it clearly appears that the findings do not support the judgment.

[13] The court found that the use of the property for multiple dwelling purposes is in the enjoyment of a substantial property right of plaintiff. To the extent that this is an adjudication of the existence of a right to use the property for such purposes, in violation of the ordinance, it is an improper conclusion of law; and to the extent that it is a finding that plaintiff would derive a benefit from such uses, it is immaterial.

[14] Another finding is to the effect that such use does not impede, hinder or interfere with the attainment of the objectives of the zoning ordinance. This finding, while really a conclusion of law, is immaterial and does not justify a decision for plaintiff in the absence of facts showing that the ordinance is unreasonable or invalid as applied to plaintiff's property. The fact that there is no showing by the city that any harm would result to the zoning plan does not render a denial of the extension unreasonable. Rehfeld v. City, etc., of San Francisco, 218 Cal. 83, 21 P.2d 419.

[15-18] Plaintiff is likewise not aided by the finding that multiple dwelling status appears to exist on a small part of the next block on both sides of Marshall Boulevard between Acacia and F Streets. There is no other finding as to multiple dwelling use in the vicinity, except as to plaintiff's property, and according to the record (see map) the only other property in the immediate vicinity which is zoned to permit such use is a small section located some three blocks from the property in dispute. The mere existence of some adjacent property devoted to other uses does not destroy the character of restricted property for residential purposes or render the restriction arbitrary. Acker v. Baldwin, 18 Cal.2d 341, 345, 115 P.2d 455; Kort v. City of Los Angeles, 52 Cal.App.2d 804, 810, 127 P.2d 66; Smith v. Collision, 119 Cal.App. 180, 186, 6 P.2d 277. The fact that there are single family dwellings nearby (on lots 71 and 72) which occupy slightly less than the amount of land required for such dwellings by the terms of another ordinance does not show that there has been any unreasonable discrimination, regardless of whether they were erected in violation of law or pursuant to a variance granted by the proper authority. The presence of nearby unsightly multiple dwellings on plaintiff's own property (middle of lots 69 and 70) cannot excuse or sanction his violation of the zoning ordinance, or furnish any reason for the granting of any extension of use to the remainder of his property. The finding that

land values have increased because of the development of a community business center does not indicate any abuse of discretion or unreasonableness in the refusal to extend the district in which business or other uses are permitted.

[19] The fact that there is a housing shortage might justify the city, or perhaps even the court, under proper conditions, in temporarily suspending the operation of the zoning ordinance during an emergency (see City of San Diego v. Van Winkle, 69 Cal.App.2d 237, 158 P.2d 774), but it furnishes no justification for a judicial decision voiding the operation of the ordinance for all time to come or for plaintiff's action in violating the ordinance.

[20] The findings that the enforcement of the ordinance would be oppressive, confiscatory and an unreasonable restriction on plaintiff's property rights, that it is impracticable to limit the use of the westerly 112 feet of lots 69 and 70 to a single family classification, that to do so constitutes an unwarranted and unreasonable invasion of plaintiff's property rights, and that no consideration of public health, peace, morals, safety or welfare requires that plaintiff be prohibited from using the structures as multiple dwellings, are in reality not findings of fact, but conclusions of law, and they can stand only if they are supported by the findings of fact. In this case, there are no findings of fact to support these conclusions, and the judgment must fall.

In view of the findings of fact in this case, we cannot say that there was any abuse of legislative discretion in denying plaintiff's requests for rezoning, or that there has been any arbitrary, oppressive or unreasonable application of the zoning ordinance to plaintiff's property, and hence the judgment in his favor cannot be sustained.

The judgment is reversed.

EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The trial court granted an injunction against the enforcement of a zoning ordinance of defendant city of San Bernardino, as against certain property owned by plaintiff in that city.

The property herein involved is the west 112 feet of lots 69 and 70, that is, a parcel with 100 foot frontage on Acacia Avenue and extending 112 feet from Acacia Avenue toward E Street in the city of San Bernardino. E Street runs north and south and is intersected by Marshall Boulevard which runs east and west. Acacia Avenue crosses Marshall Boulevard to the east of E Street, a distance of 394 feet. Marshall and E are 82.5 foot streets and Acacia is a 60-foot street. A strip extending from the west side of E to the east side of Acacia along the north side of Marshall is 100 feet wide apparently consisting of lots 71 and 72, each with a 50-foot width on Acacia and E. The strip immediately to the north of lots 71 and 72 is also 100 feet wide consisting of lots 69 and 70, each 50 feet wide on Acacia and E. All four corners of the intersection of Marshall and E are zoned for business. Particularly in regard to the block where the property involved is located, the area of the business zone includes the east 282.15 feet of lots 69 and 70 (that is, all of those lots except the west 112 feet here involved) and the east 150 feet of lots 71 and 72. All of the other property in the vicinity is in a zone calling for single family dwellings. However there are four houses on the west portion of lots 71 and 72 which occupy spaces of less than the 5,000 square feet required for single family dwellings. In other words, the business zone is a spot neighborhood business district.

E Street and Marshall Boulevard are main thoroughfares, carrying considerable traffic. On the northwest corner of the intersection of those streets, 85 feet on Marshall and 100 feet on E is a two-story building with commercial enterprises on the first floor and apartments on the second. The other three corners are devoted to business. Plaintiff has constructed on the portion of lots 69 and 70 lying east of the west 112 feet two apartment buildings, with 52 feet between them. The structures on the west 112 feet are continuations of those buildings and the area between them remains the same. A 10-foot right of way runs from Marshall to the 52-foot strip thence west to Acacia. He extended those apartments on the east portion of lots 69 and 70 to the west portion thereof making in each extension, as found by the court, "housing spaces adaptable and suitable for apartments and that there are two such apartments over the said lower portions of said buildings on said lots now in use for single family residences, and that there is in the upper portion of said building extending upon said west 112 feet of said Lot 69 additional housing space adaptable and suitable for apartment use, and that there is in the upper portion of said building extending upon said west 112 feet of said Lot 70 additional housing space adaptable and suitable for apartment use, making suitable and desirable housing space for two separate families overhead on said west 112 feet of said Lot 69 and for two separate families overhead on said west 112 feet of said Lot 70." The buildings could be used for single family dwellings or for two family dwellings on the second floor of each inasmuch as they have full facilities, including kitchens.

The validity of the ordinance generally is not questioned. It is claimed to be invalid as applied to the use of the structures on the west half of lots 69 and 70, and that because of changed conditions the ordinance is invalid as applied to plaintiff.

Defendant contends that the findings do not support the judgment nor the evidence the findings. The court found that "such a use [of the structures for multiple dwelling purposes] is in the enjoyment of a substantial property right of said plaintiff; that such a use is not deterimental to the health, safety, morals or welfare of the persons residing in the community and neighborhood in which said apartments are situated or of the residents or people of said City; that such a use does not impede, hinder or interfere in any manner whatsoever with the attainment of all the objectives for which said Ordinance was enacted; and that said four apartments on the west 112 feet of said lots 69 and 70 are so placed and erected that they are more adaptable and more useful for multiple dwelling purposes than for the purposes for which said territory is now zoned in that said apartments are now located in, adjoin and are on the same lots as constructions and properties now used for business and commercial purposes, and that the enforcement of the provisions of said Ordinance as to said plaintiff as to said four apartments on the west 112 feet of lots 69 and 70 is an oppressive, confiscatory and unreasonable restriction of his property rights therein and thereto." And "that multiple dwelling status appears to exist between Acacia St. and F Street on both sides of Marshall Blvd.; that between Acacia St. and E St. along said Marshall Blvd. on the north side are four frontages, * * * that the square feet occupied by each is in each case less than 5000 sq. ft., two on the south side of Marshall Blvd. between E St. and Acacia St. * * * each having an are[a] of less than 5000 sq. ft. Said City Ordinance No. 1675 in Article 6, Section 1, Zone 1, sets out that a requirement of an area of 5000 sq. ft. is the minimum requirement for an area for a single family residence, unless an existing survey already made should prevent the same, and the actual existing conditions appear to be that there are two dwellings on Lot 2 Thompson Bros. Poultry Subdivision on a frontage of 60 ft. just across Acacia St. from plaintiff's said west 112 ft. of said Lots 69 and 70 * * * that it is impract*ible* to maintain and limit the use of each to a single-family classification and that to do so constitutes an unwarranted and unreasonable invasion of plaintiff's property rights and that no consideration of public health, peace, morals, safety or welfare requires that plaintiff be prohibited from using said upper stories of said structure for the housing of two family-units on said west 112 feet of said Lot 69 and for the housing of two family units on said west 112 feet of said Lot 70."

The findings clearly support the judgment. As seen, there are many other multiple dwellings as well as a business district in the vicinity. The property in the rest of the block and the instant property in relation thereto as viewed by the trial court could point to the conclusion that it was impracticable and unreasonable to confine its use to single family dwellings. Most of the buildings in the area have been erected within the last four years. Changes have occurred in the neighborhood and especially immediately adjoining the property in question. The evidence supports the findings of the court inasmuch as the trial court viewed the property and its surroundings. The observations of a trial judge in viewing the premises or scene of the controversy is evidence in the case upon which findings may be based. Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576; Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; People v. Milner, 122 Cal. 171, 54 P. 833; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266; MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 271 P. 509; Vaughan v. County of Tulare, 56 Cal.App. 621, 205 P. 21.

Defendant asserts, however, that the several factors contained in the findings do not support the judgment. First, it claims that the fact that property used for business adjoins residence property does not make the zoning ordinance invalid. Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455; Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29; Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537; O'Rourke v. Teeters, 63 Cal.App.2d 349, 146 P.2d 983; Kort v. City of Los Angeles, 52 Cal.App.2d 804, 127 P.2d 66; Smith v. Collison, 119 Cal.App. 180, 6 P.2d 277. In the Baldwin and Feraut cases the attack was a general one upon the whole ordinance. In the other cases there was either an affirmance of the trial court's judgment or the physical circumstances were not the same. Second, that nearby boulevards do not invalidate single family dwelling ordinances, citing O'Rourke v. Teeters, supra, and Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, and third, that the existence of other property not conforming to the ordinance or to which a variance has been allowed is not sufficient to void the ordinance. See Rehfeld v. City, etc., of San Francisco, 218 Cal. 83, 21 P.2d 419; Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537; Magruder v. City of Redwood, 203 Cal. 665, 265 P. 806; Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 126 P.2d 954; Harris v. City of Piedmont, 5 Cal.App.2d 146, 42 P.2d 356; Ex parte Ruppe, 80 Cal.App. 629, 252 P. 746. However, it is unquestionably true that "No *one* factor determines the question of what is practical difficulty or unnecessary hardship, but *all* relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone." Brackett v. Board of Appeal of Building Department, 311 Mass. 52, 39 N.E.2d 956, 961. [Emphasis added.] Considering all of the factors present in the instant case combined with the information obtained by the court in its view of the premises, it cannot be said that it was not justified in finding that the enforcement of the ordinance as to the property here involved would have been arbitrary and unreasonable, and therefore invalid. A case closely analogous is Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93. There plaintiff's property zoned as residential was located near railroads and a cannery and farm property. This court *reversed* a judgment of the trial court which denied relief. The court said at page 216 of 14 Cal.2d, at page 94 of 93 P.2d: "Considering all the facts shown by the record, it clearly appears beyond question that the land owned by the appellant is entirely unsuited for residential purposes. The adjoining cannery with the continuous noise which must necessarily result from twenty-four hour operation, creates a situation similar to that which is found in the industrial part of a great city. Certainly no one wants to live next door to a large factory, and the question whether any consideration of public health, peace, safety or general welfare justifies the continued restriction upon the appellant's property which prohibits its use for commercial purposes is not fairly debatable. In its application to the land owned by the appellant, the ordinance is void." Likewise, in the instant case the court could have from all the circumstances as developed in the evidence and its view of the premises concluded, as it did, that plaintiff's property was not suitable for single family structures.

The majority decision is bottomed upon the erroneous premise that merely because plaintiff violated the ordinance he is not entitled to claim that it is unconstitutional as applied to him, or stated another way, that the unconstitutional hardship of the ordinance as applied to him was brought about by his violation of the ordinance. Manifestly, it is wholly immaterial whether plaintiff violated the ordinance or not. If it was, as the trial court determined, unconstitutional as applied to him, it was in effect no law and he was justified in ignoring it. He could have obtained an injunction restraining its enforcement as to him or taken the chance of the validity of his contention of unconstitutionality and refused to comply with it. *The erection of multiple family dwellings by him was not the reason that the ordinance was invalid as to him.* As above pointed out there are many other multiple dwellings in the immediate vicinity as well as a business district. Changes have occurred in the neighborhood immediately adjoining plaintiff's property. The judge of the trial court viewed the premises and concluded that to apply the ordinance to plaintiff's property is unreasonable and arbitrary. He must be considered as having seen anything and everything that would point to and establish such unreasonableness.

It is conceded in the majority opinion that a zoning ordinance is unconstitutionally applied "where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance" and "where a small parcel is restricted and given less rights than the surrounding property." It cannot be doubted that such is the situation here. At least the trial court may, from its observation, have concluded that those conditions existed. While the property in question is not wholly surrounded by business and multiple dwellings it is substantially in that situation. The majority opinion overlooks the existence of many multiple family dwellings in the area even though the "business district" mav be only a spot zone.

The majority opinion dwells on the ideas that "Zoning necessarily involves boundary problems and, when 'spot' zoning is permitted in a residential district, the legislative body must determine where the boundary is to be placed, attempting, as far as possible, to minimize the resulting inconveniences. This is essentially a legislative problem, and the determination may be attacked only if there is no reasonable basis therefor. Often there may be little difference in the character of the property on either side of the line, *but such a showing will not justify a judicial alteration or extension of the boundaries.*" [Emphasis added.] The essence of these statements is that the nature of adjoining property has no bearing upon the validity of the application of an ordinance to particular property. *That is squarely contrary to the holding of this court in* Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93. In that case a cannery was located near plaintiff's property which was zoned for residences. *Even though the question presented was merely one of boundaries* this court *reversed* the trial court and held the zoning ordinance was invalid as applied to plaintiff's property because with the nearby cannery it was not feasible to use it for residential purposes. This court stated: "Where the *exercise of that power results in consequences which are oppressive and unreasonable,* courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property." [Emphasis added.] Likewise in the instant case the use of the property in question for single family dwellings is not feasible or practicable because of the surrounding circumstances and change in the neighborhood. The property is no longer adapted to that purpose and to compel the plaintiff to make only such use of it is "oppressive and unreasonable."

Finally, it is argued in the majority opinion, and that thought is probably the decisive factor, that: "The courts cannot write the zoning laws and cannot say that the legislative body has erred in drawing the lines of the districts, or in restricting the territory devoted to business or to multiple dwellings, unless there is a clear showing of abuse of legislative discretion, i. e., that the restrictions are unreasonable." That is to say it is a legislative question whether the ordinance is being applied unreasonably. That is not true. If it were true, the courts could not declare that as to certain property the ordinance cannot constitutionally apply. In Reynolds v. Barrett, 12 Cal.2d 244, 250, 83 P.2d 29, 32, this court, after referring to the presumptions in favor of the constitutionality of a zoning ordinance generally stated: "This holding, however, is not decisive of the issues here presented. * * * It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land. If the general scheme of zoning is sound and valid, nevertheless *the courts may properly inquire as to whether the scheme of classification and districting has been applied fairly and impartially in each instance.*" [Emphasis added.] And in Rubin v. Board of Directors, 16 Cal.2d 119, 126, 104 P.2d 1041, 1044, the court declared that although the denial by the local planning commission of an application for a variance from the ordinance is not reviewable in the courts, "The finality of the board of directors' determination does not bar the respondents from *asserting in a judicial proceeding that the zoning law is unconstitutional as applied to their property*" [Emphasis added.] Moreover, the legislative body cannot be said to have exercised its judgment with respect to the propriety of the ordinance as applied to plaintiff's property. *Circumstances have changed* and that body has not reconsidered the ordinance in the light of the changes. It has merely done nothing.

The effect of the majority opinion in this case is to commit to the legislative body the solution of all questions of both fact and law which arise when a zoning ordinance is attacked for unreasonableness in its application to certain property unjustly affected thereby. This is contrary to the rule which has been uniformly followed in the prior decisions of this court hereinabove cited and discussed. The decision of the trial court is in accord with these decisions and should therefore be affirmed.

SHENK, J., concurred.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Mr. Justice CARTER and generally in the discussion supporting it.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

77 Cal.App.2d 524

RISHWAIN et al. v. SMITH et al.

Civ. 7298.

District Court of Appeal, Third District, California.

Jan. 2, 1947.

1. Landlord and tenant 🔑291(13)

In unlawful detainer suit, evidence sustained finding that purchasers of business took possession of sellers' buildings with consent of sellers and their wives under agreement of sellers to execute lease in accordance with specific terms. Code Civ.Proc. §§ 735, 1161; Civ.Code, § 789.

2. Landlord and tenant 🔑290(3)

Where purchasers of business took possession of building of sellers with consent of sellers and their wives under written agreement containing all essential terms of a valid two year lease at fixed monthly rental with definite provision wherein sellers agreed to execute a lease in usual standard form of business lease for term of two years, the purchasers were not unlawfully withholding possession. Civ.Code, § 789.

3. Landlord and tenant 🔑290(2)

Where purchasers of business took possession of building of sellers under written agreement containing all essential elements of valid two year lease and purchasers performed their covenants incident to proposed lease but sellers breached their written contract by failure to execute formal lease, they could not complain of purchaser's occupancy of building. Civ.Code, § 789.

4. Landlord and tenant ⚷290(2)

Where purchasers of business took possession of building of sellers under agreement to execute formal lease which agreement contained essential elements of valid two year lease, purchasers did not violate their agreement to enter into lease by refusing to execute proposed leases which failed to conform to written agreement by omitting important provisions and by adding thereto other onerous covenants contrary to agreement.

5. Landlord and tenant ⚷290(3), 291(10)

An equitable defense to an action for unlawful detention of real property is proper, and when pleaded such defense should be considered in determining whether defendants are unlawfully withholding possession. Code Civ.Proc. § 1161.

6. Landlord and tenant ⚷290(3)

Where purchasers of business took possession of building of sellers under written agreement containing all essential elements of valid two year lease and providing for execution of formal lease but sellers breached agreement by failing to execute lease, the sellers were not entitled to recover possession in unlawful detainer suit even if purchaser might not have been entitled to specific performance of agreement to lease because wives of sellers had not signed written agreement. Code Civ.Proc. § 1161.

7. Husband and wife ⚷254
Partnership ⚷68(1)

Where buildings were purchased as partnership property from partnership funds, the buildings were partnership property and not community property.

8. Partnership ⚷68(1)

Property acquired with partnership funds is partnership property, in spite of fact that it may be bought in individual names of partners. Civ.Code, § 2402.

9. Trusts ⚷102(1)

Real property held in individual names of partners acquired from partnership funds and devoted to exclusive use of partnership business is held in trust for benefit of partnership.

10. Husband and wife ⚷262(2), 264
Partnership ⚷68(1)

In unlawful detainer suit, where plaintiffs claimed that written agreement to execute lease relied upon by defendants was unenforceable because not signed by plaintiff-wives, burden was on plaintiffs to establish that buildings were community property and not assets of partnership existing between plaintiff-husbands, and evidence sustained finding for defendant. Code Civ.Proc. §§ 735, 1161; Civ.Code, §§ 789, 2402.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Unlawful detainer suit by J. T. Rishwain and wife and B. T. Rishwain and wife against Edward R. Smith and Charles Hansen independently and as co-partners doing business under the firm name and style of Smith & Hansen. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellants.

L. A. Mills and O. C. Parkinson, both of Stockton, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from a judgwhich was rendered against them in a suit in unlawful detainer. Defendants bought plaintiffs' partnership business in Stockton, including the merchandise, fixtures and equipment, for $400,000. The written agreement of sale included, as part consideration therefor, a lease, or agreement to lease the store buildings for two years on specified terms, with a provision that plaintiffs would execute a more specific lease in accordance therewith, which they failed to do. The defendants took possession of the buildings pursuant to that agreement and paid the rent. Defendants' answer sets up their fulfillment of the agreement, part performance and other equitable defenses to the suit for unlawful detention. The court determined that defendants were not unlawfully withholding the property.

The plaintiffs contend that since the defendants took possession of real property under a written memorandum for a lease which contemplated the subsequent execution of a more formal lease which has not been executed, the defendants are unlawfully withholding possession thereof, and that, since the wives of plaintiffs did not sign the written agreement to lease the property, it cannot be enforced.

On the theory that defendants were holding the property as tenants at will, since no formal lease had been executed, a thirty-day notice to vacate was served under Section 789 of the Civil Code, after which this suit for unlawful detention, under Section 1161 of the Code of Civil Procedure, and demand for treble damages pursuant to Section 735 of the last mentioned code, was commenced. The answer denied the material allegations of the complaint, and affirmatively alleged that the defendants lawfully took and hold possession of the real property with the consent of plaintiffs, under a written agreement for a lease, dated October 30, 1944, for a term of two years, with an option to renew it for three years more, at the rental of $400 per month; that said agreement provides that plaintiffs would execute a more specific lease "in the usual standard form of business leases in this area," according to the stipulated terms of the agreement, which they failed and refused to do; that the defendants took possession and paid all rent and complied with the terms and conditions of said agreement, and that they are and at all times have been willing to execute a lease in accordance therewith; that said written agreement contains all essential terms constituting a valid lease, and that the defendants are not unlawfully withholding possession of the property.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendants. The court determined that the defendants entered possession of the premises as lessees November 6, 1944, with the consent of plaintiffs, under the terms of the written agreement, dated October 30, 1944, containing all essential terms of a valid lease, including the names of the parties, the description of the property, the commencement and duration of the term, the amount of the rental to be paid monthly, and other specified terms and conditions. The court further found that the defendants paid all rental which was due; that the leased property belongs to the plaintiffs J. T. and B. T. Rishwain, as copartners; that the written agreement was made with the consent and knowledge of the respective wives of said plaintiffs, and that defendants took possession with the consent of said plaintiffs and their wives; that the renting of the property was a part of the consideration for the purchase from the owners by defendants of the business, stock of merchandise and equipment for the sum of $400,000, which was fully paid, according to the terms of said written agreement containing the provision that "Sellers agree to execute, and Buyers agree to take and accept a lease in the usual standard form of business leases in this area," in accordance with the specific terms mentioned therein; that the defendants complied with the terms of their agreement; that the real estate was the partnership property of Rishwain Bros., and not the community property of any of the plaintiffs or their wives; that plaintiffs failed to execute a more formal lease in accordance with the provisions of their written agreement, but offered to the defendants a proposed lease which was not in the agreed "usual standard form of business" or in conformity with the stipulated terms of the written agreement, but which, on the contrary, contained "onerous" terms contrary to the stipulations of the written agreement. Judgment was accordingly rendered against plaintiffs to the effect that they take nothing by their action.

Subdivision 8 of the written agreement reads as follows: "8. Sellers are the owners of the real property in which is contained the Stockton office and warehouse of said business. The said Sellers agree to execute, and Buyers agree to take and accept a lease in the usual standard form of business leases in this area, which lease shall be for the term of two years commencing as of November 6, 1944, with a monthly rental of said Stockton office and warehouse of $400.00, and with an option unto Buyers to continue said lease in effect for three further years from its original expiration date at the same rental and under the same terms and conditions. In this lease Sellers shall be obligated to pay only city and county real property taxes, fire insurance upon the said building, and the cost of maintaining the roof and the foundation of the buildings thereof. All other costs and expenses of all kind, nature and description pertaining to the occupancy by Buyers of said Stockton premises, and the maintenance thereo shall be borne and paid for by Buyers. Said lease shall further contain the usual clause against subletting and assignments by Buyers (lessees therein). However, the clause against subletting and assignments shall not be arbitrary and if Buyers shall desire to assign said lease or sublet any portion of said premises to any third party of sound financial responsibility, then Sellers shall consent to such assignment or subletting upon condition that Buyers shall act as and be guarantors for payment of all rentals under said lease if so assigned in whole or in part."

[1-3] The findings are supported by the evidence. Assuming, without so deciding, that the written agreement to lease real property contemplates a subsequent more formal lease in accordance with the specified terms contained therein, which will therefore not support an action for specific performance (Store Properties, Inc., v. Neal, 72 Cal.App.2d 112, 164 P.2d 38), we are nevertheless of the opinion the defendants are not unlawfully withholding possession under the circumstances of this case for the reasons that defendants took possession of the buildings in Stockton, with the consent of plaintiffs, under the terms of a written agreement between the owners and the defendants containing all the essential elements of a valid two year lease at a fixed monthly rental (Levin v. Saroff, 54 Cal.App. 285, 201 P. 961), with the definite provision therein that the owners "agree to execute * * * a lease in the usual standard form of business leases in this area, which lease shall be for the term of two years commencing as of November 6, 1944, with a monthly rental of said Stockton office and warehouse of $400.00," etc. The agreement to lease was an important part of the consideration mentioned in the written agreement of October 30, 1944, by the terms of which the defendants purchase from the plaintiffs, Rishwain Brothers, their wholesale grocery and tobacco business in Stockton, together with fixtures and equipment, previously conducted by them in the buildings in question, for the sum of $400.00, which was fully paid. The defendants took possession of the buildings and paid or tendered the stipulated rent, and performed all of their covenants incident to the proposed lease. They were at all times ready and willing to accept and execute a more formal lease in accordance with the specified terms and conditions mentioned in the written agreement. The plaintiffs breached their written contract to sell the grocery business and lease the buildings by failure to execute or present a more formal lease in accordance with the stipulated terms of the agreement. They may not complain of defendant's occupancy of the buildings under such circumstances.

It is true that on or about November 8, 1944, plaintiffs did present to the defendants a proposed formal lease, which was rejected, and which neither party signed. It was rejected by the defendants on the grounds that it omitted specific covenants contained in the agreement, and added several onerous provisions not contained in the agreement, and because it was not "a lease in the usual standard form" agreed upon. Expert witnesses testified that several of the covenants contained in that proposed lease were not ordinarily found in the usual standard forms of leases in that vicinity. We think the objections to the proposed lease were well founded, and that it was not in conformity with the provisions of the written agreement.

The written agreement provided for a two year lease with the option to renew it for three years more, and the privilege of assigning or subletting the lease in whole or in part "to any third party of sound financial responsibility." The proposed lease provided that it would absolutely expire at the end of the two year term, and that it could not be assigned and no part of the premises could be sublet or leased "without the written consent of Lessor first had and received" ; that the property could be used "only for the purpose of Lessee conducting therein * * * a wholesale grocery and wholesale tobacco business." The agreement contained no such restriction as to the use of the buildings. The only restriction of the agreement against subletting a portion of the buildings was that it should be made to "any third party of sound financial responsibility." The agreement provides that the owners shall maintain the roof and the foundations of the buildings at their cost. The proposed lease provided that "All alterations, repairs and improvements permitted shall be at the sole cost and expense of Lessee." The proposed lease also declares that the lessee waives the benefits of the provisions of Section 1161 of the Code of Civil Procedure, and that the lessee "hereby irrevocably appoints Lessor as the agent and attorney-in-fact," in the event of their breach of covenants, to enter the premises and remove all property and to place it in storage at the expense of the lessees. The proposed lease prohibits the sale at auction of any property on the premises, and also makes it a breach of the lease, subject to forfeiture, if the lessees permit "any odors or offensive smells * * * to permeate the air thereabouts, * * * [or] any harsh or loud noises or sounds * * * on or about, or to arise or come from said premises." No such restriction was mentioned in the written agreement.

Upon notice of rejecting said proposed lease on said grounds, among others, the plaintiffs submitted another proposed lease, which was not executed. The second form includes several of the foregoing covenants which were not included in the written agreement, and omitted other important ones contained therein. Among the objectionable provisions was one restricting the use of the premises to the lessees' sole maintenance therein of a wholesale grocery and tobacco business. That would prohibit subletting for any other purpose. It specifically prohibits the subletting of any portion of the premises to any one for any purpose, except upon the written consent of lessors and "upon such terms as Lessor may see fit" to permit, and then only upon condition that the lessees shall guarantee the payment of all rentals and the fulfillment of all terms and conditions. That provision was contrary to the written agreement.

This proposed lease was also rejected for the reasons that it omitted important covenants included in the written agreement and because it included onerous covenants in absolute conflict therewith. The defendants, although they were not required to do so, then executed and presented to the plaintiffs a proposed lease, which, upon examination, appears to be just, reasonable and in accordance with the stipulations of the written agreement. This lease was rejected by the plaintiffs. This suit for unlawful detention was then commenced, as we have previously stated.

[4] We conclude that the defendants did not violate their agreement to enter into a more particular lease by refusing to execute the said proposed leases presented by plaintiffs, since they failed to conform to the written agreement by omitting important provisions contained therein, and by adding thereto other onerous covenants contrary thereto, not required by law or by "a lease in the usual standard form of business leases in this area." For those reasons the defendants were not unlawfully withholding the property.

In the Levin case, supra, 54 Cal.App. at page 291, 201 P. at page 963, it is said: "An agreement to execute a lease for a given period at a stated rental, payable in specific installments, is not broken by a refusal to execute a lease which imposes terms and conditions not imposed by law and of which no mention was made in the instrument. 24 Cyc. 899; Sanders v. Pottlitzer, 144 N.Y. 209, 39 N.E. 75, 29 L.R.A. 431, 43 Am.St.Rep. 757."

In that case it is also said, 54 Cal.App. at page 290, 201 P. at page 963: "When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material. Post v. Davis, 7 Kan.App. 217, 52 P. 903; Bonnewell v. Jenkins, L.R. 8 Ch.Div. 70, 74."

In the present case the defendants pleaded and proved an equitable defense to plaintiffs' summary proceeding of unlawful detention, as they had a right to do. That equitable defense consists of the fact that, as a part consideration for the purchase of plaintiffs' mercantile business in Stockton for the sum of $400,000, which was paid, the defendants also agreed to lease the buildings in which the business had been conducted, for the term and rental designated, and upon the specified conditions mentioned in the written agreement. That agreement was partly performed by the defendants' taking possession of the buildings and paying the stipulated rent. If a more formal lease was contemplated by the parties, as we think it was, the burden was on the plaintiffs to execute and present to the defendants such lease in substantial conformity with the expressed terms of the agreement. Plaintiffs failed to do so. They thereby breached their written agreement to lease the property. It follows that the defendants were not unlawfully withholding possession of the buildings, and the court properly determined that plaintiffs were entitled to recover nothing by their action.

[5, 6] An equitable defense to an action for unlawful detention of real property is proper, and when pleaded such defense should be considered in determining whether the defendants are unlawfully withholding possession. This principle has been upheld even where the defendant takes possession under an oral agreement to lease. Schubert v. Lowe, 193 Cal. 291, 295, 223 P. 550; Olympic Auditorium, Inc., v. Superior Court, 81 Cal.App. 283, 253 P. 944; Linnard v. Sonnenschein, 94 Cal.App. 729, 272 P. 315. Under such circumstances it is immaterial that the defendants may not be entitled to specific performance of the agreement to lease in the unlawful detention proceeding. In the case of Schubert, supra, the Supreme Court said regarding defendant's right to invoke an equitable defense in a suit for unlawful detention: "While the defendant was not entitled to a judgment in the present proceedings decreeing specific performance of the agreement to execute the lease, nevertheless the part performance of such an agreement can be interposed as an equitable defense to the plaintiff's attempt to wrest from him the possession of the premises by the summary proceedings in unlawful detainer. In the case of Gray v. Maier, etc., 2 Cal.App. 653, 84 P. 280, the court, referring to the right to set up defenses of an equitable nature in such actions, had this to say: 'The power of a court of equity is invoked by plaintiff in every action in forcible detainer, when he seeks in his complaint to have a forfeiture declared on account of default in conditions of the lease. * * * If such an equitable power is in a court in cases of this class, of which we have no doubt, no reason is apparent why such equitable power may not be extended into a full examination of all the equities involved, to the end that exact justice be done.' In the case of Knight v. Black, supra, [19 Cal.App. 518, 126 P. 512,] it was held error on the part of the trial court to strike out the equitable defense there pleaded by the defendant in his answer. In other words, the fact that the defendant cannot obtain specific performance of an oral agreement to execute a lease does not deprive him of the right to have the court examine into the equities existing between the parties in determining whether or not the plaintiff is entitled to evict the defendant. It is a well-recognized rule of equity that part performance of an oral agreement to execute a lease for a longer period than a year may take the case out of the operation of the statute of frauds. [Citing authorities.]" [193 Cal. 291, 223 P. 552]

The court concludes in that case that: "It was therefore proper for the defendant to raise, and for the court to consider, the occupation of the premises under the oral agreement to lease, as an equitable defense to the action to recover possession of the property."

That is exactly what the trial court did in the present case. The equities in favor of the defendants in this case are far stronger than in any of the cited cases in which that doctrine was upheld. We may not disturb the court's findings in that regard.

The appellants contend that the written agreement containing the memorandum of the terms for the lease cannot be specifically enforced since "the wives have never executed the agreement involved." It is true that Joseph T. Rishwain married his wife, Rose, December 5, 1934, and that B. T. Rishwain married his wife, Mary, April 28, 1935, and that the wives did not sign the written agreement of sale of the mercantile business dated October 30, 1944. The plaintiffs, J. T. and B. T. Rishwain, who are brothers, established a wholesale grocery business in Stockton in January, 1931, before their marriages, which business was maintained under the partnership name of Rishwain Brothers. About a year later, their father, T. J. Rishwain, became a member of that copartnership, which interest he retained until August 9, 1944, when he sold it to his said sons, conveying to them his interest in the real property, consisting of the two warehouses in Stockton where the business was conducted. Their wives were not named as grantees in that deed. The partners bought the warehouse property at 829 East Weber Street in Stockton in 1935 for the sole use of the partnership business. It was deeded in the individual names of the three partners as grantees April 29, 1938. The wives were not mentioned as grantees in that deed. The warehouses were paid for by cash or property belonging to the partnership assets. All taxes, costs of repairs and maintenance were paid from the partnership funds. This property was used for no other purpose than that of the partnership business. The agreement, dated October 30, 1944, for sale of the business to defendants, including the terms of the proposed lease, designated J. T. and B. T. Rishwain as "copartners under the firm name and style of Rishwain Bros.," and as owners of the buildings and property. The wives of J. T. and B. T. Rishwain had complete knowledge of the sale and of the proposed lease and the expressed terms thereof. There was some discussion between the spouses regarding the adequacy of the specified rental of $400 per month. That sum was finally agreed upon by them. On those facts and the entire evidence of the case, the court found that the real estate was the sole property of the partnership, and not the community property of the members thereof, and that it was leased and occupied by defendants as part consideration for the agreement of sale of the business, with the consent of both the partners and their respective wives. Those findings are adequately supported by the evidence.

Even if the defendants could not enforce specific performance of the written agreement to purchase the business and to rent the buildings, because the wives of the partners had not signed the instrument, that fact could not deprive the defendants of their equitable defense against this suit for the alleged unlawful detention of the buildings. Schubert v. Lowe, supra. Plaintiffs failed to restore to the defendants any part of the consideration for that agreement. The defendants took possession of the buildings in reliance upon the terms of that agreement, and paid the rent. The agreement was executed by the partners with knowledge of its terms on the part of their wives. In determining the question regarding the alleged unlawful detention, the court had a discretion in deciding the equitable defenses. Those issues were determined adversely to the plaintiffs.

[7–10] The partnership existed before the marriages occurred. There is evidence that the buildings were purchased as partnership property from partnership funds. The buildings were therefore partnership property, and not community property. Property acquired with partnership funds is partnership property, in spite of the fact that it may be bought in the individual names of the partners. Civil Code, sec. 2402; Roberts v. Eldred, 73 Cal. 394, 397, 15 P. 16; Perelli-Minetti v. Lawson, 205 Cal. 642, 649, 272 P. 573; 20 Cal.Jur. 721, sec. 38. Real property held in the individual names of partners, acquired from partnership funds and devoted to the exclusive use of the partnership business, is held in trust for the benefit of the partnership. Swarthout v. Gentry, 62 Cal.App.2d 68, 78, 144 P.2d 38. The burden was on plaintiffs in this case to show that the buildings were community property and not partnership assets. They failed to do so. The court specifically determined that issue against them. The findings in that regard are amply supported by the evidence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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GIESE v. CITY OF LOS ANGELES et al.

Civ. 15303.

District Court of Appeal, Second District,
Division 1, California.
Dec. 27, 1946.

1. Equity 🔑51(1)

Equity abhors litigation by piecemeal and will prevent a multiplicity of suits by, whenever possible, settling and determining all differences between the parties and leaving nothing further to be litigated between them upon the same subject matter.

2. Action 🔑6

Where plaintiff was merely seeking a judicial declaration of his present existing rights under the fire and police pension system and was not petitioning the court to order him retired with such a pension, defendant's attempt to obtain a determination of plaintiff's status as a member of the fire department and his rights to benefits of the fire and police pension system in one proceeding in order to avoid a multiplicity of suits was properly denied. Code Civ.Proc. §§ 1060, 1062.

3. Action 🔑6

In action for declaratory relief to determine whether fire department equipment superintendent had been member of city fire department entitled to pension fund benefits since 1929 when he was appointed to department as automobile electrician, finding that superintendent spent substantial portion of his time from 1921, when he began to work in shop operated by another city department, until 1929 on repair and maintenance of fire department apparatus, was authorized by evidence. Code Civ.Proc. §§ 1060, 1062, 1844, 1847.

4. Municipal corporations 🔑200

The charter provisions, and not rules of chief engineer of fire department, determine whether fire department equipment superintendent is member of city fire department entitled to fire and police pension fund benefits.

5. Action 🔑6

Evidence warranted finding that fire department equipment superintendent was, for fire and police pension fund benefit purposes, a fire department employee with duties having a substantial connection with prevention or extinguishing of fires.

6. Action 🔑6

In action for declaratory relief to determine whether fire department equipment superintendent was member of city fire department entitled to fire and police pension fund benefits, other employees in fire department machine shop who actually did the work which superintendent supervised and who occupied different classifications and performed different tasks were not necessary or proper parties, since they would not be bound by judgment declaring superintendent's rights in the position and classification which he occupied. Code Civ.Proc. §§ 1060, 1062.

7. Appeal and error 🔑1071(1)

Where city stipulated that fire department equipment superintendent did not waive his rights under fire and police pension fund by filing declaration with city employees' retirement system, city was not prejudiced by finding that filing of declaration did not cause superintendent to become a member of city employees' retirement system.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Walter A. Giese against the City of Los Angeles and others for declaratory relief to determine whether or not the civil service position which the plaintiff holds as Superintendent of Automotive Equipment of the Los Angeles Fire Department entitles him to the benefits of the Fire and Police Pension Fund. From the judgment, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and John J. Tully, Jr., Deputy City Atty., both of Los Angeles, for appellants.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action against defendants for declaratory relief to determine whether or not the civil service position which the former holds as Superintendent of Automotive Equipment of the Los Angeles Fire Department entitles him to the benefits of the Fire and Police Pension Fund as provided by Article XVII, sections 180 to 189 of the Charter of the City of Los Angeles.

By its declaratory relief judgment in favor of plaintiff, the trial court decreed that plaintiff is a member of the Fire Department of the City of Los Angeles, duly and regularly appointed thereto under civil service rules and regulations, and "whose duty it is to prevent or extinguish fires in the City of Los Angeles" (Charter of the City of Los Angeles, Article XVII, section 185). From such judgment defendants prosecute this appeal.

The factual background which gave rise to this litigation may be thus epitomized:

Plaintiff entered the service of the city of Los Angeles on July 5, 1921 as a machinist, appointed under civil service rules and regulations in the Engineering Department of the Board of Public Works. The Los Angeles City Fire Department at that time, and until 1937, did not operate a shop of its own in which to repair fire apparatus and equipment. Until 1937, apparatus and equipment of the fire department was repaired, maintained and rebuilt in the shop operated by the Board of Public Works and in which plaintiff worked.

From July 5, 1921, to February 4, 1929, plaintiff worked as a machinist, in the course of which employment he worked on the repairing, maintaining and rebuilding of fire department apparatus and equipment, and worked upon other automotive equipment owned and operated by other departments of said city.

On February 4, 1929, after successfully passing a civil service examination, plaintiff was appointed under civil service rules and regulations to the Fire Department of the City of Los Angeles as auto electrician. From the last-mentioned date to the time when the fire department acquired its own shop in 1937, plaintiff, in his capacity as auto electrician, worked exclusively on the repair, maintenance and rebuilding of fire department equipment and apparatus, and, according to his testimony, he would go to various fire stations of the department to do some of the work.

In 1937 the fire department acquired its own shop and from that time all fire department equipment and apparatus has been repaired, maintained and rebuilt in the fire department shop which is used exclusively for that purpose. From 1937 to 1941, plaintiff continued to work at his position of fire department auto electrician, doing his work in the fire department shop and continuing to devote all of his time exclusively and solely to the repair, maintenance and rebuilding of fire department equipment and apparatus.

On April 7, 1941, plaintiff took, and successfully passed, an inter-departmental promotional civil service examination for the position of Fire Department Equipment Superintendent in the Los Angeles Fire Department. On November 1, 1941 he was regularly appointed, under civil service rules and regulations, to the civil service position in the fire department of the city of Los Angeles, known as Fire Equipment Superintendent of the Los Angeles Fire Department. Subsequently, the name of this position was changed to Superintendent of Automotive Equipment of the Los Angeles Fire Department.

Since November 1, 1941, plaintiff has been solely and exclusively engaged in the performance of the duties of the last-named position. The nature of his duties may be summarized by here setting forth special order number 2, issued by the Chief Engineer of the Los Angeles Fire Department, reading as follows:

"Walter A. Giese has been promoted to the position of Superintendent of Automotive Equipment of the Fire Department. By authority of this appointment he is placed in direct and complete control of the department shop and employees assigned to that division of the department. He will be obeyed and respected accordingly. John H. Alderson, Chief Engineer."

There is evidence that during his tenure in his present position, plaintiff has supervised the repair, maintenance and rebuilding of fire department apparatus, including fire pumps, fire engines, ladder trucks, chief's automobiles, fire boats, and all fire equipment, apparatus and automobiles used by the fire department of said city. There is also evidence that in the performance of his duties as Superintendent of Automotive Equipment, plaintiff is present at and assists in conducting and observing fire underwriters' tests of new fire apparatus and equipment; that he assists in the conduct of tests of the reconstructed and repaired trucks, pursuant to orders issued by the Chief Engineer, who is the chief administrative officer of the fire department. Plaintiff has given courses of lectures and studies on the operation and maintenance of fire apparatus and pump operations to the captains and engineers of the Los Angeles Fire Department.

Plaintiff has been furnished by said city with a fire department automobile for his own use, which is painted red with the words "Fire Department of the City of Los Angeles" inscribed upon it. While his automobile does not carry a siren or red light, he has the privilege of passing through fire lines at conflagrations.

On April 1, 1942, without his request or consent, plaintiff was informed by the appellant Board of Fire Commissioners of the City of Los Angeles that he was no longer to be classified as a member of, or as holding a position in such fire department, entitled to the benefits of the Fire and Police Pension Fund of the City of Los Angeles, as provided in the aforesaid charter provisions, and that he and his position were thereafter to be classified under the City Employees' Retirement System.

Since November 1, 1941, defendants have caused to be deducted from plaintiff's salary the rate of contribution chargeable to the members of the City Employees' Retirement System. In that regard, it is noteworthy that, until November 1, 1941, plaintiff had continuously contributed to the Fire and Police Pension Fund and such contributions were accepted by defendants.

As the first ground of appeal, it is urged by appellants that the trial court erred in denying their motion that the court require respondent, as a part of this proceding, to either assert any claim to credit under the Fire and Police Pension System, for the years he worked upon fire department apparatus and equipment as an employee of the Board of Public Works, for the period from July 5, 1921 to February 4, 1929, or to forever waive any such claim in the event he did not assert it at the trial.

Appellants contended at the trial, and now urge on appeal, that respondent's counsel "intimated or definitely stated" at the trial that if respondent was successful in the proceeding, he "might bring another action to have his status determined as being that of a person entitled to the benefits of the Fire and Police Pension System for the above-mentioned period while he, as such employee for the Board of Public Works, worked upon Fire Department apparatus and equipment."

In support of their argument, appellants urge that their motion should have been granted in order to avoid a multiplicity of suits with reference to the same subject matter, and in order to finally and fully determine respondent's status as a member of the fire department and his rights, if any, to the benefits of the Fire and Police Pension System in one proceeding.

[1, 2] We fail to perceive wherein the well-known precept that equity abhors litigation by piecemeal and will prevent a multiplicity of suits by, whenever possible, settling and determining all differences between the parties and leaving nothing further to be litigated between them upon the same subject matter, can be successfully invoked in the instant proceeding. The question presented herein is not whether respondent has served the requisite number of years or otherwise qualified himself for retirement under the Fire and Police Pension System, and is presently entitled to be retired with a fireman's pension. The question posed on this appeal is whether, under his present position, respondent is currently entitled to be classified as a person entitled to a fireman's pension when he elects to go on the retired list. Respondent was, therefore, merely seeking a judicial declaration of his present existing rights under the Fire and Police Pension System and was not petitioning the court to order him retired with such a pension.

Section 1060 of the Code of Civil Procedure provides in part as follows:

"Declaratory relief. Any person * * * who desires declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, * * *. He may ask for a declaration of rights or duties, *either alone or with other relief; and the court may make a binding declaration of such rights and duties, whether or not further relief is or could be claimed at the time.*" (Emphasis supplied.)

The ruling of the court would also seem to find support in the terms of Section 1062 of the Code of Civil Procedure which reads:

"The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, *and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same* facts." (Emphasis added.)

Respondent was the sole occupant of the position of Superintendent of Automotive Equipment of the Los Angeles Fire Department, and in this action sought only to settle his rights and to be afforded relief from uncertainty and insecurity with respect to his status and rights and his alone, under the pension system. The nature of the action and the code sections under which it was instituted impress us that the ruling of the trial court was not error and did not constitute an abuse of discretion.

[3] Appellants' next contention is that the court erred in finding and determining that respondent, from July 5, 1921, to February 4, 1929, spent a substantial portion of his time working on, repairing, maintaining and rebuilding fire department apparatus and equipment. In this regard, appellants concede that respondent testified that the type of his work with the Board of Public Works from 1921 to 1929 was "working with fire apparatus, the majority of the work was on fire apparatus and part of it was on engineering department trucks." It must be remembered that during such period the fire department did not have any automotive equipment repair shop of its own and all of its repair and maintenance work was done in the shop maintained by the Board of Public Works in which respondent worked under an appointment made pursuant to civil service rules and regulations. Under sections 1844 and 1847 of the Code of Civil Procedure, the foregoing direct, uncontradicted and unimpeached testimony of respondent, if believed by the court, was sufficient to support the challenged finding. But appellants assert that they "carefully refrained from offering any testimony or evidence upon this subject matter and did not cross-examine petitioner upon his testimony relating thereto." This attitude upon the part of appellants was occasioned, they say, because of the fact that the court had denied their motion to order respondent, as a part of this proceeding, to either claim credit for said period to the benefits of the Fire and Police Pension System, or to forever waive any such claim. As heretofore pointed out, this action was not commenced to determine whether respondent was entitled to retirement and to presently receive a pension, but was brought to compel appellants to classify petitioner, as the judgment herein provides, "as a member of the Los Angeles Fire Department since February 4, 1929." That is all respondent sought, and that is all that the judgment establishes. The judgment contains no adjudication of respondent's rights for classification as a memeber of the fire department from 1921 to 1929. Nor do the conclusions of law deduced from the findings of fact determine any controversy save and except that, since February 4, 1929, respondent has been and is a member of the Fire Department of the City of Los Angeles "within the meaning and purview of and entitled to the benefits of Article XVII of the Charter of the City of Los Angeles."

Appellants' main ground of appeal is that the court erred in finding and determining that the respondent is a member of the fire department; that it is his duty to prevent and extinguish fires; and that it is his duty to attend fires.

With reference to appellants' argument that respondent's duties did not include attendance at fires, while the evidence is in conflict in that regard, it is nevertheless conceded that, as testified to by the Chief Engineer of the Fire Department, one of appellants' witnesses, respondent could be ordered to attend a fire. The chief engineer testified that respondent "cannot go to a fire while on duty, without orders." And there is in the record evidence that respondent did attend some fires during the time he has been in the city service.

Section 185 of the city charter provides that, for the purposes of the Fire and Police Pension System, the fire department "* * * shall consist of all persons duly and regularly appointed in the Fire Department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said Fire Department."

[4] Appellants insist that the unrefuted and uncontradicted testimony of the Chief Engineer of the Los Angeles Fire Department establishes that "in the language and parlance of the Fire Department, there is a difference between a 'member' and an 'employee'; that the word 'member' means a person in the uniformed rank of the Fire Department and does not include 'employees' or persons not of the uniformed rank"; that the rules and regulations of the Fire Department were prepared, written, reviewed, approved and adopted with that distinction between "member" and "employee" in mind. However, it is not the rules and regulations promulgated by the Chief Engineer of the Fire Department that determines respondent's status, but the charter provisions. And the Supreme Court in the case of McKeag v. Board of Pension Commissioners of City of Los Angeles, 21 Cal.2d 386, 389, 132 P.2d 198, 199, said:

"In the absence of a special definition of membership in a pension statute, no unique or exclusive group is connoted by use of the word 'member.' Under such circumstances it has been held that the word 'member' in pension statutes is synonymous with the word 'employee.'"

The case just cited involved a construction of the precise charter provisions now before us, and the Supreme Court held that such provisions were not limited in their application to those only who engage directly in the physical act of extinguishing or preventing fires. The test is thus stated by the court at page 391 of 21 Cal.2d., at page 200 of 132 P.2d: "We think, therefore, that all that is required under section 185 to constitute an employee a member of the fire department is *that his duties have a substantial connection, either direct or indirect, with the prevention or extinguishing of fires* in the city of Los Angeles."

In the last cited case, the duties of the employee included the keeping of records, contact with the public, advising of fire prevention measures, receiving information regarding fire hazards, making personal investigations and ordering the remedying of conditions, drafting legislation and rules for safeguarding against fires, and attending the scenes of fires to convey information and to make records of conditions for later fire prevention legislation and rules.

In the case of Knoll v. City of Los Angeles, 21 Cal.2d 396, 132 P.2d 203, it was determined that the employee, whose duty it was to keep statistical records of fires, was entitled to a pension under the Fire and Police Pension System. And it has been judicially determined that a fireman's pension must be given to a blacksmith's helper (Hurley v. Sykes, 69 Cal.App. 310, 231 P. 748) and to a fire department painter (Haas v. City of Los Angeles, 21 Cal.2d 393, 394, 132 P.2d 201).

[5] In the light of these cases, we have no hesitancy in saying that the trial court's finding that respondent herein was an employee of the Fire Department, whose duties have a substantial connection, either direct or indirect, with the prevention or extinguishing of fires in the city of Los Angeles, is abundantly supported by the evidence.

Respondent's duties were in part prescribed by the 1934 rule book in which sections 213 to 219 governing his position as Superintendent of Automotive Equipment provide:

"Section 213: The Superintendent of Automotive Equipment shall have direct supervision of shop equipment and those employees assigned to him and shall, with the approval of the Chief Engineer, establish the necessary rules for efficient control.

"Section 214: He shall have supervision of the rebuilding, repair and general overhauling of apparatus and equipment.

"Section 215: He shall supervise the testing of new and repaired apparatus, raising devices, etc., before they are put into service.

"Section 216: He shall assist in training programs when ordered by the Chief Engineer.

"Section 217: He shall make routine reports and recommendations, and any others requested or necessary for the good of the service.

"Section 218: He shall cause to be kept proper records of the activities of the Mechanical Division.

"Section 219: He shall perform such other duties and related work as required."

Manifestly, if respondent did not efficiently operate the repair shop of which he was in charge, the extinguishing of fires in the city of Los Angeles would be seriously impaired. It is also without contradiction in the record that respondent, at the direction of the chief engineer, prepared and delivered a course of lectures and instructions to the uniformed fire fighters to familiarize them with the operation of pumps and other fire extinguishing equipment.

[6] Appellants next contend that the trial court erred in denying their motion to bring in, as parties of this proceeding, all employees in the machine shop of the fire department who actually do the work which respondent supervises. We can not see wherein the rights of others employed under respondent's supervision in the fire department machine shop were in any way affected or prejudiced by the instant action or the judgment rendered therein. This for the reason that respondent is the sole and only occupant of the position of Superintendent of Automotive Equipment, and, as heretofore noted, the question presented to the court was limited to a determination of whether the duties of the occupant of this single position have a substantial connection, either direct or indirect, with the prevention or extinguishing of fires. Other employees, occupying different classifications and performing different tasks, not being bound by the judgment declaring respondent's rights in the position and classification he occupies, were not necessary or even proper parties. Appellants' motion was properly denied.

Appellants' final contention is that the court erred in finding and determining that the written declaration executed and filed by respondent, on or about November 28, 1941, with the Board of Administration of the City Employees' Retirement System, did not cause respondent to become a member of said Employees' Retirement System. In this regard, the record discloses the following as having occurred at the trial:

"Mr. Scott (One of Counsel for respondent): May I offer a stipulation, if they are willing to stipulate that at the time he signed this so-called declaration to the Board of City Employees' Retirement Association System, he did not waive his rights to being a member of the Fire and Police Pension System and his rights under that system?

"Mr. Tully (Deputy City Attorney): That is correct."

[7] Following such stipulation, the court, upon motion of appellants themselves, ordered that their defense based upon waiver be stricken from their answer. Similar action was taken as to all testimony relating to the subject of waiver. Appellants, therefore, were not prejudiced in any way by the aforesaid finding and determination that the waiver in question did not deprive respondent of his right to assert his claim for a pension under the Fire and Police Pension System. In their briefs, appellants concede that respondent did not waive any rights to his membership in the Fire and Police Pension System in filing his declaration with the City Employees'

Retirement System, and that should the court determine, as it did, that respondent was entitled to the benefits of the Fire and Police Pension System, his application for membership in the City Employees' Retirement System was without any force or effect.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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77 Cal.App.2d 489

TENNANT v. CIVIL SERVICE COMMISSION OF CITY OF LOS ANGELES et al.

Civ. 15363.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1946.

Hearing Denied Feb. 27, 1947.

1. Municipal corporations ⇨205

Action of Los Angeles civil service commission in approving discharge of water department employee was a "discharge" effective until set aside, even if a hearing was not had, and subjected employee to city charter provision barring action to compel reinstatement of employee claiming an unlawful discharge unless claim for compensation and reinstatement is filed within 90 days from date of claimed unlawful discharge.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharge".

2. Municipal corporations ⇨218(9)

The extent of judicial relief available to employee of Los Angeles, whose discharge has been approved by civil service commission under circumstances where a hearing has not been had is to order a hearing before the commission.

3. Municipal corporations ⇨205

Proceeding before civil service commission of Los Angeles to consider charges made against water department employee which had resulted in employee's discharge constituted a "hearing", notwithstanding that statements were not made under oath, where no objection was made at the time, and since permitting unsworn testimony is at most a judicial error which cannot be taken advantage of except upon timely objection being made.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearing".

4. Municipal corporations ⇨205

In proceeding before civil service commission of Los Angeles to consider charges made against water department employee which had resulted in employee's discharge, admitting statements not under oath concerning undisputed facts was not prejudicial to employee.

5. Municipal corporations ⇨205

In proceeding before civil service commission of Los Angeles to consider charges made against water department employee which had resulted in employee's discharge, that report of investigation was not introduced in evidence did not preclude proceeding from constituting a hearing where no objection to procedure was made at the time, and report was read in presence of employee and his attorneys and was filed with the commission, and the maker of the report was available for cross-examination, and employee did not deny the statements therein.

6. Municipal corporations ⇨205

In proceeding before civil service commission of Los Angeles to consider charges made against water department employee which had resulted in employee's discharge, failure to introduce into evidence transcript of interview between employee and deputy city attorney which was read before the commission did not preclude proceeding from constituting a hearing, where no objection at the time was made to the procedure, and the part read consisted solely of the interview and the deputy attorney was available for cross-examination and employee did not deny making the statements attributed to him.

7. Municipal corporations ⇨205

Calling a proceeding, before civil service commission of Los Angeles to consider

charges made against water department employee which had resulted in employee's discharge, an "investigation", did not determine its character as not constituting a "hearing", but its character was to be determined from a consideration of what actually occurred during the proceeding.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by Frank J. Tennant against the Civil Service Commission of the City of Los Angeles to require the commission to accord petitioner a full and fair hearing on charges made against him by the Department of Water and Power as grounds for his discharge as a civil service employee of that department. From a judgment ordering writ of mandamus to issue, the commission and others appeal.

Judgment reversed. Petition for mandamus denied.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and George William Adams, and T. Paul Moody, Deputy City Attys., all of Los Angeles, for appellants.

George E. Cryer and R. Alston Jones, both of Los Angeles, for respondent.

WOOD, Justice.

This is an appeal from a judgment ordering that a writ of mandamus issue requiring the Civil Service Commission of the City of Los Angeles to accord petitioner a full and fair hearing on charges made against him by the Department of Water and Power as grounds for his discharge as a civil service employee of that department. The Civil Service Commission will be referred to as the commission, and the Department of Water and Power will be referred to as the department.

On August 8, 1944, the petitioner, who had been employed in the classified civil service in the department about 20 years, was served with a copy of a written notice which the department had given to the commission informing it that the department had on that day discharged petitioner from his position as a machine shop foreman. The causes for his discharge therein specified were: That "he was regularly paid by and accepted from the United Tool and Manufacturing Company a gratuity of $25 per week" during a time when the department was doing work for said company, which work was under the immediate supervision of petitioner; that he lent to said company and others various tools, equipment and other property belonging to the department; that he was negligent in permitting practices to exist in those portions of the shop under his control which practices resulted in the use without charge of department-owned materials in work done in said shops for said company and for others.

On August 11, 1944, petitioner filed with the commission a written denial of the charges, demanded an investigation and a hearing, permission to submit evidence, and demanded that he be reinstated and paid his salary from the time of the "unlawful discharge or removal." On August 15, 1944, the commission referred said demand to the staff of the commission for investigation. Thereafter the general manager of the commission investigated the charges.

Petitioner was duly notified that the charges against him would be considered by the commission at its meeting on September 12, 1944, and at such meeting on that date the petitioner and two attorneys representing him were present. At that time the general manager read his report of the investigation, and filed the report with the commission. The report included an affidavit of petitioner and 14 letters filed by petitioner in his own behalf, which affidavit and 2 of the letters were read at that time. Also read was part of a transcript of a shorthand report of an interview which a deputy city attorney had had with petitioner on August 2, 1944. The transcript of that interview, consisting of 50 pages, was filed as an exhibit in the proceeding.

The part of the interview between the deputy city attorney and petitioner which was read before the commission in the presence of petitioner showed that he admitted receiving $25 a week for a year or more from the United Tool Company. His answers given therein, concerning the reason the money was paid to him, were indefinite. Some of such answers were: "Well, I could not say. After all they just paid it to me, see. I did not ask them," and, "Well, he told me, Mr. Haney told me he was going to give me a little check for—to kind of compensate me for what I was doing for them in the way of helping out."

At this meeting petitioner did not deny that he received the money, but asserted, as a defense, that he was paid the $25 per week by the private company for work he did on his own time; further, that he was not responsible for the practices in the shops of the department which resulted in the misuse of tools and material for the benefit of private companies.

The reading of the report was interrupted from time to time by members of the commission in order to ask the petitioner questions. One of such questions was: "How could you do this extra work in other places other than on City property? Did you do it at home or right on the City property, the work for which you were paid the $25.00?" His answer was: "I was working mostly in an engineering capacity. If you have gone through my reports there, you will find I have done a good deal of that work for the Department." Another such question was: "Were any of these superiors aware of the fact that you were receiving this $25.00 weekly, and that you were providing tools of the Department for the outside jobs, and also providing the outside jobs with some scrap material?" His answer was: "Mr. Flemming would be the only one who would know about it, but I didn't tell him about it. If he knew he would get his information from United Tool or somebody, as he was interested in the Company." After the reading from the report and after the report had been filed, a commissioner asked petitioner if there was anything he could add to the report, and petitioner said: "I believe you have my affidavit there that I would like to have read, and then if there are any questions you would like to ask me, I would be willing to answer them in regard to any of the work done down there, or regarding the loan of tools and material." Petitioner made statements personally in his own interest, his two attorneys made arguments in his behalf, and the deputy city attorney also presented an argument. The commission took the matter under submission and on January 2, 1945, found that grounds for the discharge, as stated in the notice, were sufficient and were sustained and approved the discharge. On January 3, 1945, petitioner received notice of this confirmation of his discharge.

Appellants contend that petitioner's application for a writ of mandate is barred by section 112½ of the Charter of the City of Los Angeles in that petitioner did not file with the commission a demand for reinstatement within 90 days from the date of his alleged unlawful discharge.

That section provides, in part: "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within 90 days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. * * * Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement."

Petitioner did not file a demand for reinstatement or a claim for compensation that complied with the requirement of section 112½. He did file with the commission a demand for reinstatement and for compensation on August 11, 1944, as above stated, but that was before the commission had sustained the action of the department. It was stated in Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, at page 720, 160 P.2d 816, at page 818: "The only reasonable interpretation of the foregoing provisions of the charter [referring to section 112½] is that the written demand must be filed as required by section 112½ within 90 days after the order of the board sustaining the action of the department." Petitioner's demand herein was, as found by the trial court, premature and of no effect. It was held in the Steen case that any claim of the employee for relief when the department first files its notice of discharge is made to the commission pursuant to procedure in section 112(a) and that such a claim for relief is the preliminary step for action by the commission; that the demand by the employee for reinstatement under section 112½ is the preliminary step to seeking judicial relief. Petitioner, without filing any demand for reinstatement or for compensation after the commission made its order sustaining his discharge by the department, filed this action on November 15, 1945, more than 10 months after the commission made its order sustaining the discharge. As provided in section 112½ above quoted, the filing of such a demand for reinstatement is a condition precedent to the maintenance of any action for reinstatement.

Petitioner contends that he is not seeking to be reinstated by this action or to be paid compensation, but merely to require appellants to accord him a hearing; and that therefore section 112½ does not apply. In support of said contention, petitioner argues that he may not be discharged without being accorded a full and fair hearing; that a proceeding to remove him has been filed but has never been completed; and that he merely seeks a hearing in order that the administrative process may be completed.

[1] After the decision of the commission sustaining the discharge, petitioner apparently considered the matter closed and continued to so consider it until after the decision in the case of La Prade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13, was rendered on October 1, 1945, holding that the employee was entitled, under certain conditions, to a hearing before the commission. The petitioner herein having failed to perform a condition precedent to maintaining an action to compel reinstatement, namely, to demand reinstatement within the time provided by law, and having concluded, apparently since the La Prade case decision, that he had not had a hearing before the commission, commenced this action on the theory that he was seeking only a hearing before the commission and was not seeking reinstatement. His argument, in support of that theory, is that since he had not had a hearing he had not been lawfully discharged, and therefore that the requirement that he should demand reinstatement within 90 days after his discharge, as a condition precedent to maintaining an action for reinstatement, is not applicable since he had not been discharged and is still an employee. It would seem, under such argument, that if any error occurs in a proceeding before the commission, which proceeding results in sustaining the discharge of an employee, he would not be lawfully discharged, and therefore the time limit of 90 days for demanding reinstatement, prior to action for judicial relief, would have no application and he could seek judicial relief, other than reinstatement, at any time thereafter. Such argument is based upon the fallacious premise that a discharge as a matter of fact cannot exist unless such discharge was made in a lawful manner. If there could be no discharge as a matter of fact unless the discharge was made as provided by law, it would follow as a necessary conclusion that there could be no unlawful discharge. If there could be no unlawful discharge there would be no basis for the provision in said section 112½ requiring the filing of a demand for reinstatement within 90 days "Whenever it is claimed by any person that he has been *unlawfully* suspended, laid off or *discharged*," and the section would be meaningless. (Italics added.) The action of the commission in sustaining the discharge of an employee is a discharge of the employee effective until the action is set aside, even though the commission erred in matters of procedure or in the action taken. Petitioner's contention that he was not discharged by the action of the commission is not sustained. It appears therefore that his action is necessarily based upon the premise that he was unlawfully discharged, and that he is subject to the provisions of section 112½ requiring a demand for reinstatement by one who claims he was unlawfully discharged.

Although petitioner asserts that this action is merely to obtain a hearing before the commission, and although by this action he does not ask the court to reinstate him, it appears that his action is a preliminary step in a design to accomplish his reinstatement upon a further proceeding before the commission, or to so revive his efforts for reinstatement before the commission that he could, if there should be another adverse decision by the commission, make a timely demand for reinstatement as required by section 112½ and then seek reinstatement directly by the court. In other words it appears that reinstatement is the ultimate object of the petitioner. If it were not so, and if the object of the action were solely to obtain a hearing in order that the administrative process might be completed, without the intention of petitioner to secure reinstatement, no beneficial purpose would be served by the relief sought and the issue would be purely academic, and for that reason it should not be considered by the court. It appears that his action is necessarily based upon an attempt to obtain reinstatement, and that he is subject to the provisions of section 112½ requiring a demand as a condition precedent to maintaining the action.

[2] The provisions of section 112½ are not to be construed as meaningless, under the contentions of petitioner above mentioned. They are for the useful purpose of fixing a time limit and the formalities necessary as a basis for a court action after the commission has sustained the discharge of an employee. If a discharged employee claims that the commission erred in matters of procedure or even in failing to have a hearing, the commission should be given an opportunity to grant a rehearing or a hearing prior to an action by the discharged employee for judicial relief. As stated by the Supreme Court in the Steen case, supra, 26 Cal.2d at page 722, 160 P.2d at page 819, "The demand [referring to demand for reinstatement] may be somewhat analogous to the requirement of a petition for a rehearing addressed to the board. The board is given an additional opportunity to pass upon the issue before resort is had to the courts." Since the extent of judicial relief under circumstances where a hearing has not been had is to order a hearing before the commission (La Prade v. Department of Water and Power, supra), a proper interpretation of section 112½ is that it requires, as a condition precedent to maintaining any action necessarily based upon the premise that a person has been unlawfully discharged and therefore should be reinstated, that a demand for reinstatement be filed with the commission within 90 days after its order sustaining the discharge, even if the commission in so acting failed to hold a hearing. Having failed to make such a demand, this action is barred by the provisions of said section.

Appellants assert that petitioner was given a hearing as to the charges against him. He was given notice of the meeting, and he and his two attorneys were present. (The attorneys who represented him before the commission are not the attorneys who represent him in this action.) The transcript of the proceeding before the commission covers 29 pages, exclusive of the general manager's report, the transcript of the shorthand report of the prior interview with petitioner, his affidavit, and the letters. The report of the general manager reciting facts sufficient to sustain the discharge was read in petitioner's presence and in the presence of his attorneys, and was made available for his consideration. Also a transcript of a shorthand report of an interview between a deputy city attorney and petitioner was read and filed as an exhibit. Petitioner admitted that he received the money from a private company, but claimed it was for work done on his own time. He did not contend that tools and material were not misappropriated, but asserted that he did not misappropriate anything and that he was not responsible for any misappropriation by others. He was the foreman of the shop where work was being done by the department for the private company. He was questioned at length by the commissioners, asked if he could add anything to the report, and was given a full opportunity to present a defense and to refute, test and explain the evidence against him. He made statements in his own behalf, and his two attorneys made arguments for him. As above stated, he did not demand reinstatement within 90 days after the charges were sustained, and did nothing at all concerning the adverse decision until more than 10 months thereafter when he commenced this action.

Petitioner contends that the proceeding did not constitute a hearing because no witnesses were examined, no evidence was received, and no proof was made of any fact involved in the charge. His argument is that an oath was not administered to anyone and no statements under oath were taken, and that the report was not introduced in evidence.

[3, 4] As to the oath not being administered, petitioner did not object to the manner in which the proceeding was conducted, and did not object to statements being made which were not under oath. Permitting a person to testify without being sworn is not a jurisdictional matter but is at most a judicial error which cannot be taken advantage of except upon timely objection being made. Trigueiro v. Skow, 24 Cal.App.2d 253, 256, 74 P.2d 836; People v. Duffy, 110 Cal.App. 631, 635, 294 P. 496. His own affidavit, of course, was properly considered. It is to be remembered that he admitted that he received the $25 per week, and that it was not disputed that tools and material of the department, in the shop where he was foreman, were used by the private company which paid him the money. The only controversy related to explanations advanced by him as to the reason the money was paid to him, and as to his non-responsibility for misuse of the tools and material. Of course, he is not in a position to contend that there was no hearing because his statements given as explanations before the commission were not under oath. Since the evidence against him as to receipt of the money and the use of the tools and material was not in dispute, the matter of receiving statements not under oath concerning those undisputed facts was not prejudicial to him. The cases relied upon by him relating to the necessity for testimony to be given under oath are not applicable here, since the reason for such safeguard does not exist under the peculiar facts of this case, particularly in view of the undisputed points above mentioned.

[5] As to the report not being introduced in evidence, no objection was made as to the procedure in connection with it. It was read by the one who made it, in the presence of petitioner and his attorneys, and was filed with the commission. The maker of it was there, available for cross-examination, and presumably could have been placed under oath if the petitioner had requested it. Petitioner did not deny the statements therein.

[6] As to the transcript of the interview between the deputy city attorney and petitioner not being introduced in evidence, no objection was made as to the procedure in connection with it. It was filed as an exhibit, but the specific words "introduce it in evidence" were not used. The portion of that transcript which was read before the commission in the presence of petitioner and his attorneys consisted solely of the interview between the deputy city attorney and the petitioner. The deputy city attorney was present at the proceeding before the commission, was available for cross-examination, and presumably could have been placed under oath if the petitioner had requested it. Petitioner asserts that the report was hearsay, and that the person who made the shorthand notes or the deputy city attorney or any other person who was present when the alleged statements were made should have been called to testify. Petitioner, however, did not object to the report, and did not deny that he made the statements attributed to him.

The La Prade case, above mentioned and cited by petitioner relative to the necessity for introducing a report in evidence, is distinguishable from the present case in that in the cited case the employee was not advised that the report of investigation was favorable to him, and no report of investigation was referred to.

The petitioner's answers at the interview with the city attorney, concerning the reason the money was paid, were indefinite and evasive, and were inconsistent with his answers on the same subject at the meeting before the commission.

[7] During the proceeding a commissioner said, "Mr. Freeman, We don't con-

duct legal hearings, and do not have to conduct a hearing at all," and that, "We are merely making an investigation." The record shows that these statements were not made for the purpose of limiting the presentation of petitioner's defense, and that they did not have that effect. It appears that such statements were merely to indicate that the commission considered that it was not required to conduct a hearing. The second statement above referred to was made in response to a question by one of petitioner's attorneys, as follows: "There will be no further hearing now?" At another time in the proceeding the commissioner also referred to "an additional hearing." The character of the proceeding, however, is not to be determined by the name used in referring to it. Its character is determined from a consideration of what actually occurred during the proceeding.

The petitioner was given a hearing.

The judgment is reversed. It is ordered that the petition for a writ of mandamus be and the same is hereby denied.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

77 Cal.App.2d 487

In re MEISTER'S ESTATE.
WELLS et al. v. MEISTER.

Civ. 15614.

District Court of Appeal, Second District, Division 2, California.
Dec. 31, 1946.

1. Appeal and error 🔑1011(1)

Conflicts will be disregarded by appellate courts when the findings are sustained by substantial evidence.

2. Descent and distribution 🔑71(6)

Evidence supported finding that intestate was survived by a sister, three brothers, a nephew and niece, so that surviving husband was entitled to a distribution of only one-half of intestate's estate to him.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Proceeding in the matter of the estate of Mary Meister, deceased, wherein Julius Meister filed a petition for an order for distribution of the entire estate to him as surviving husband and only heir at law of decedent, contested by Lucy Wells and others. From decree determining heirship and ordering distribution, Julius Meister appeals.

Affirmed.

Carson B. Hubbard, of Huntington Park, for appellant.

Willedd Andrews, of Los Angeles, for respondents.

WILSON, Justice.

In the first and final account and petition for distribution the administrator of the estate of decedent alleged that appellant, Julius Meister, was the surviving husband and the only heir at law of decedent and petitioned for an order for distribution of the entire estate to him. Contestants (respondents) filed an opposition to the account and petition alleging that they were respectively the surviving sister, three brothers, a nephew and a niece of decedent, and prayed that the shares of the estate to which they were legally entitled be distributed to them. After a trial of the issues raised by the opposition the court found (1) that appellant is the surviving husband of decedent, Mary Meister; (2) that decedent was the daughter of Gertrude Morales and Miguel Morales and that both had predeceased her; (3) that there were also born to said Gertrude Morales and Miguel Morales the following named children: Lucy, Mike, George, Nick and Katherine who were brothers and sisters of decedent; (4) that Lucy is married and is now named Lucy Wells; (5) that Katherine died prior to the death of decedent and left a son, George Pacheco, and a daughter, Percilla Encinas, two of the contestants. A decree was entered determining heirship in accord with the findings and ordering the estate distributed as follows: One half to the surviving husband, one tenth each to the surviving brothers and sister, and one twentieth each to the nephew and niece. From the decree determining heirship and ordering distribution the surviving husband has appealed.

The only ground of appeal is that the evidence is insufficient to sustain the findings (1) that Gertrude and Miguel Morales were the parents of decedent, and (2) that the persons named in the findings as decedent's brothers, sister, niece and nephew were such in fact. The absence of any foundation for the appeal and its lack of merit will appear from an examination of the evidence.

Lucy Morales Wells, one of the contestants and respondents, testified that Miguel and Gertrude were her father and mother; that Mike, George, Nick, Katie [Katherine] and Mary were her brothers and sisters; that all were children of Miguel and Gertrude; that Katie was also known as Lorenza; that Mary was the deceased wife of Julius Meister, appellant; that she (the witness) lived "with the family and those brothers and sisters" in Ventura; that from 1906 to 1922 she lived with Mary (decedent) during which time the latter was married to Sacramento Duarte; that she left home when she was eight years of age. The cross-examination developed no contradictions of her direct testimony. The fact that she did not know who supported her family or whether her father was married more than once is immaterial. Her lack of knowledge is no doubt due to the fact that she left home at an early age and resided in Los Angeles County with her sister while the family continued to live in Ventura.

Mike Morales, Nick Morales and George Morales each testified that he was the son of Miguel and Gertrude; that the brothers and sisters were named Lorenza, Mary, Lucy, Mike, George and Nick. Nick visited Mary in Puente while she was married to Sacramento Duarte and they called each other brother and sister. Mary cared for him when he was a baby. George and Mary called each other brother and sister. George Pacheco and Percilla Encinas testified that they were respectively son and daughter of Lorenza [Katie or Katherine] Morales.

A girlhood friend of decedent testified that the latter was known as Maria Ignacia Figueroa; that she married Sacramento Duarte and later married appellant; that Soloman Figueroa was decedent's father. A trust officer of the Bank of America testified that Lucy Wells had stated to him that decedent's mother was Gertrude Costia and her father was Soloman Figueroa. Appellant testified that decedent told him that she was reared by the Morales family, that Morales treated her like a father and remembered her in his will, but she did not state that Mike Morales was her father.

[1, 2] The evidence of appellant and his witnesses is only slightly contradictory of that given by respondents. The trial judge evaluated the evidence. He believed the testimony given by respondents and it sustains the findings and the order of distribution. Appellant asks us to make a minute analysis of the evidence, to select isolated statements passim, to hold that respondents have not sustained the burden of proof, and to make findings contrary to those made by the trial court. This request should have been and no doubt was addressed to the trial judge but without avail. Appellate courts have repeatedly stated that it is elementary that conflicts will be disregarded when the findings are sustained by substantial evidence. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App. 2d 777, 779, 163 P.2d 756 and cases cited; Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559; Estate of Isenberg, 63 Cal. App.2d 214, 216, 146 P.2d 424; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. We find no reason in this case for departing from the established rule.

Decree affirmed.

MOORE, P. J., concurs.

MODERN BARBER COLLEGES, Inc. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al. *

Civ. 13189.

District Court of Appeal, First District, Division 2, California.

Dec. 30, 1946.

Hearing Granted Feb. 27, 1947.

1. Mandamus ⚷73(1)

A mandamus action would not lie to compel state Employment Stabilization Commission to vacate its decision that petitioner was employer and that certain persons were employees of petitioner within Unemployment Insurance Act and to cancel charges against petitioner in commission's books in view of prohibition contained in the act. Gen.Laws, Act 8780d, § 45.10.

2. Constitutional law ⚷43(1)

A corporation, refusing to pay taxes under Unemployment Insurance Act when able to do so on theory that it is not employer within such act, cannot later attack constitutionality of provision thereof that employer, paying contributions under protest, may sue for recovery thereof, on ground that corporation has no funds to meet state Employment Stabilization Commission's demands for contributions. Gen. Laws, Act 8780d, § 1 et seq., § 45.10.

NOURSE, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by the Modern Barber Colleges, Inc., against the California Employment Stabilization Commission and its members for a writ of mandate to compel defendants to vacate the Commission's decision that petitioner is an employer and that certain persons are employees of petitioner within the Unemployment Insurance Act and to cancel any charges against petitioner on the Commission's books and records. Judgment for defendants, and petitioner appeals.

Affirmed.

Ralph Robinson, of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., of Sacramento, for respondents.

DOOLING, Justice.

The appellant filed a complaint in the Superior Court against the respondents, California Employment Stabilization Commission and its members, seeking a writ of mandate to compel respondents to set aside and vacate the decision of the respondent commission holding that the petitioner is an employer and that certain persons are employees of petitioner, and to clear the books and records of respondent commission by removing and cancelling any charges made against the petitioner therein. A demurrer to the complaint was sustained without leave to amend and judgment for respondents followed from which this appeal is prosecuted.

The complaint alleges that petitioner is a corporation engaged in teaching the barber trade as a duly and regularly approved barber college under the laws of this state; that E. M. Robinson owns all of its capital stock and operates its business as if no corporation had been formed; the employment by the school of two instructors from 1936 to 1941 and of one instructor since that date; the employment of a part time bookkeeper; that students of the school practice barbering on paying patrons as a part of their course of instruction and are given 25 per cent of the money paid by patrons for whom they so render service; that the respondents have found that E. M. Robinson, who owns all of the assets of petitioner, the two instructors, the part time bookkeeper, and the students who receive commissions for services rendered in their practice barbering are employees of petitioner; and that none of such persons are employees within the meaning of the California Unemployment Insurance Act. The complaint further alleges the attempt of respondents to collect from petitioner over $3,000 alleged to be due as taxes from petitioner and said alleged employees under the terms of such act.

[1] It may be conceded, without deciding those questions, that some or all of

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* Subsequent opinion 192 P.2d 916.

such persons are not employees within the meaning of the California Unemployment Insurance Act and that the respondent commission has erroneously determined that they are employees and has erroneously assessed unemployment taxes upon their earnings. Even if such concession is made it is the position of respondents that the action in its present form is prohibited by the terms of section 45.10 of the Unemployment Insurance Act (Gen.Laws 8780d) which reads: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contribution sought to be collected; but after payment of any such contribution under protest * * * the employer * * * may bring an action * * * for the recovery of contributions so paid under protest."

We are convinced that the position of respondents is sound. By this action appellant is seeking the issuance of a writ of mandate to compel the California Employment Stabilization Commission to correct its records by cancelling its determination that contributions are owing from the appellant. If the writ of mandate so prayed for were to issue it would prevent the collection of such contributions in direct violation of the quoted provision of sec. 45.10.

In Louis Eckert Brewing Co. v. Unemployment R. Comm., 47 Cal.App.2d 844, 119 P.2d 227, the court reversed a declaratory judgment determining that the plaintiff corporation was not an employer under the Unemployment Insurance Act on the ground that sec. 45.10 precluded the remedy. The court said at page 846 of 47 Cal.App.2d at page 228 of 119 P.2d: "The effect of section 45.10 is to preclude a judgment such as the trial court undertook to enter in this case. The commission herein could not properly undertake to enforce a tax against plaintiff corporation as an employer in defiance of an adjudication that the latter did not maintain that relationship with the other parties. A declaratory judgment is an adjudication, not an abstraction. Collier Advertising Service, Inc., v. City of New York, D.C., 32 F.Supp. 870. Public officials must respect the court's declaration and follow its interpretation of the law. Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 287 N.Y.S. 288."

This reasoning applies with even greater force to the present proceeding. The effect of the writ of mandate if granted would be to compel the cancellation of the determination that a tax is due, thus effectively preventing the collection of the tax, in defiance of the express prohibition of sec. 45.10 of the act. If this petitioner may, without first paying the tax, have a judicial determination in a mandamus proceeding that no tax is in fact due, then every putative employer would be entitled to the same remedy and the legislative purpose embodied in sec. 45.10 would be entirely frustrated. It was doubtless this consideration that moved the legislature to include expressly in sec. 45.10 the words "or writ of mandate" in the enumeration of prohibited actions for the prevention of the collection of contributions.

Cases like Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935, which involved a determination of the correctness of the action of the commission in awarding benefits under the act, are not in point. Nor is Seaside, etc., Hospital v. California Emp. Comm., 24 Cal.2d 681, 151 P.2d 116. In the latter case the court allowed a recovery of taxes already paid in a mandamus action but plainly intimated that such an action would not lie to prevent the collection of a tax. At pages 684, 685 of 24 Cal.2d, at page 118 of 151 P.2d the court said:

"Section 45.10 is obviously designed to prevent the use of injunctive process against tax collections, and to provide an adequate remedy in lieu thereof—payment of the tax under protest—which would safeguard the employer's interests without interfering with the normal functioning of the act. The provision seems reasonable, and no attack is made by petitioner on its application to any case coming within its terms. However, the present proceeding does not fall within the statutory language.

"With respect to the first part of the section, the prohibition is against the use of injunction or other legal or equitable process to prevent the collection of contributions sought to be collected, whereas petitioner is not trying to enjoin or prevent any such collection, but to secure a refund of payments already made. Obviously there cannot be any enjoining or preventing of a payment which has already been made."

In the case before us no payments have been made and the only purpose of the action is to prevent the collection of contributions assessed against appellant by compelling the commission to cancel the assessments.

[2] It is alleged in the complaint: "That your petitioner has no funds with which the demands of the Respondents may be met", and appellant argues that in the face of that allegation the requirement of sec. 45.10 that it pay the taxes and sue for their recovery would be unconstitutional. It is not alleged that at the times that the taxes accrued petitioner was unable to pay them. Quite to the contrary the complaint alleges: "That during all the times herein mentioned and now your Petitioner has never deducted any portion of the commissions paid to the students for the purpose of transmitting the same to the Respondents in the manner and for the purposes provided for in the Unemployment Insurance Act, nor has your Petitioner made contributions to the Respondents as provided in said act for the reason and upon the theory that your Petitioner is not an employer under the act." Appellant cannot refuse to pay the taxes when it is able to do so, and later attack the constitutionality of sec. 45.10 because it may have since dissipated the funds necessary to meet the requirements of the act.

Judgment affirmed.

GOODELL, J., concurs.

NOURSE, Presiding Justice (dissenting).

The trial court sustained a general demurrer to the petition without leave to amend. The petition at least states a good cause of action as to the students in the barber school. Section 7 of the Unemployment Insurance Act (Gen. Laws, Act 8780d) declares: "The term 'employment' does not include: (l) (3) (iii) (when) such service is performed by a student who is enrolled and is regularly attending classes at a school, college or university." This barber school is one organized under the specific terms of section 6534 of the Business and Professions Code, which defines the institution as a "barber school" or "barber college." If it was intended to exempt only a school which teaches reading, writing and arithmetic it was for the legislature to so declare. The petition alleges, and the demurrer of course admits, that as to the students in the school the relation of employer and employee does not exist. If the petition prays for more than the petitioner is entitled to that does not cure the error in the order denying leave to amend. Under the facts alleged in the petition the case comes squarely within the rule of Seaside, etc. Hospital v. California Emp. Comm., 24 Cal.2d 681, 151 P.2d 116, 117. That was an action in mandate to review the administrative ruling that the hospital was not exempt under the terms of the employment act and also to order the refund of *past* contributions. In that case, as on this appeal, the commission relied strongly upon the provisions of section 45.10 of the act reading in part: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof *to prevent or enjoin under this act the collection of any contribution sought to be collected.*" (Emphasis ours.) The supreme court said that this section "Is obviously designed to prevent the use of injunctive process against tax collections, and to provide an adequate remedy in lieu thereof—payment of the tax under protest—which would safeguard the employer's interests without interfering with the normal functioning of the act." At page 684 of 24 Cal.2d, at page 118 of 151 P.2d. The court directed attention to the provisions of the section which prohibit the use of injunction or other remedy "To prevent * * * the collection of any contribution sought to be collected." At page 685 of 24 Cal.2d, at page 117 of 151 P.2d:

Manifestly the effect of the final judgment in the Seaside case was "To prevent or enjoin * * * the collection of any contribution" levied upon the petitioner subsequent to the final determination that it was not an employer under the Act. A judgment in this case holding that petitioner was not an employer would have the same effect upon *subsequent* charges. But it would have no effect on prior charges and would not "prevent or enjoin" the *collection* of such prior charges.

The Seaside case differs from this in that the charges there were paid under protest. But as here the petitioner sought a writ of mandate to require the commission "To rule that it was exempt from the operation of the act, that it was entitled to a refund of past contributions, and that corespondents were not entitled to benefits." At page 683 of 24 Cal.2d, at page 117 of 151 P.2d. The writ was granted *as prayed* and the judgment was affirmed in full, the court saying: At page 685 of 24 Cal.2d, at page 118 of 151 P.2d. "It thus appears that every necessary administrative step has been taken by petitioner, that the commission has rendered its final decision, and that under section 45.11 it is the duty of the commission to refund the contributions paid, as was ordered by the trial court's judgment herein. The right of petitioner to review by mandamus is therefore clear. See Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935; cf. Louis Eckert Brewing Co. v. Unemployment R. Comm., 47 Cal.App.2d 844, 119 P.2d 227, strongly relied upon by appellant, wherein the employer failed to seek a final decision by the commission." It is suggested that the supreme court affirmed the judgment only so far as it ordered the refund of contributions paid. But there are no such limitations in the opinion and it must be assumed that the portion of the judgment ordering a correction of the records was also affirmed, since the judgment was affirmed in full. If this is correct the judgment would have the same effect as that sought here—it would prevent the collection of *future* contributions to be levied, though these were not paid prior to the filing of the petition.

The majority opinion cites with approval Louis Eckert Brewing Co. v. Unemployment R. Comm., 47 Cal.App.2d 844, 119 P. 2d 227. That case contains some very bad law. It was a proceeding for a declaratory judgment determining whether the petitioner was in fact an employer under the act. The proceeding was authorized by section 1060, Code of Civil Procedure because of an "Actual controversy relating to the legal rights and duties of the respective parties." The district court reversed the judgment for petitioner on two grounds—that it was barred by section 45.10 of the employment act, and that the petitioner had failed to exhaust its administrative remedies. On the second ground the case is sound. On the first ground the district court based its reversal on the statement that: at page 846 of 47 Cal.App. 2d at page 228 of 119 P.2d. "The commission herein could not properly undertake to enforce a tax against plaintiff corporation as an employer in defiance of an adjudication that the latter did not maintain that relationship with the other parties." Thus the meet of the decision is that the commission should be permitted to *improperly* penalize the petitioner and force him to pay unjust taxes with no remedy but a suit to recover those paid under protest. But the reason given for this holding is equally bad—that conditions might change in the subsequent year under which the petitioner would become an employer, thus requiring another court action to determine his status. How this same result would not follow an action to recover prior taxes paid under protest is not explained. Unfortunately our majority has followed the bad reasoning of that opinion.

The clear purpose of section 45.10 is to prevent legal proceedings which *restrain* the *collection* of contributions pending the litigation. There is nothing in the language of the section which justifies a conclusion that the legislature intended to deny all parties their legal rights unless they paid the penalty imposed by the commission. The power to grant a writ of mandamus stems from the Constitution (Art. VI, sec. 5). If the legislature must deny this constitutional right to any individual or set of individuals the legislation should be in clear and certain terms. I am satisfied that the legislature did not intend to prohibit the use of mandate as outlined in the majority opinion. Clearly the only purpose of the section is to prevent "legal or equitable process" through which the employer could refuse payment while he is litigating the question of his obligation under the act.

Let us assume that a group of employees are dissatisfied with a ruling of the commission that they are employees under the terms of the act. Their employer refuses to make the contributions from their wages under section 44 of the act. There is no means by which the employees could pay the contributions. They certainly should be permitted to seek a judicial determination of their rights through the constitutional remedy of mandate.

But if section 45.10 permits the narrow construction given it by the majority, the right of the petitioner is cleared by section 1094.5 of the Code of Civil Procedure. This was enacted in 1945. Section 45.10 was amended in 1939 to include the provisions here under attack. As the latest expression of the legislature section 1094.5 gives *all* persons the right to proceed by mandate to inquire "Into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required * * *." It is such an order that the petitioner here seeks to review. The petitioner alleges that his final appeal was denied and that he had exhausted all his administrative remedies. If section 1094.5 means anything at all it means that an aggrieved party may seek by mandate a final decision or order of any administrative agency which he contends is a denial of his legal rights under the administrative act.

It is significant that the commission has no faith in the validity or equity of its order. No contributions have been made by petitioner since 1936 and apparently no action has been brought by the commission to enforce payment since the petition alleges that no payments have been made during that entire period. Thus the commission, by an unreasonable and hypertechnical interpretation of the act, has for ten years harassed the petitioner by arbitrary and unfair demands contrary to the purposes of the act.

I do not believe that section 45.10 was intended to do more than prevent process enjoining collection of contributions while litigation was pending. But if the interpretation of the majority is sound the later enactment of section 1094.5 of the Code of Civil Procedure gives the petitioner the right to review the order without compliance with an illegal demand to pay an unjust and invalid contribution.

77 Cal.App.2d 442

HORSLEY v. HORSLEY.

Civ. 15350.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1946.

Hearing Denied Feb. 24, 1947.

1. Divorce 🔑303(1)

Orders relating to the custody and care of minor children of divorced parents are not final, and question on each occasion where such orders are sought to be modified is addressed to the trial court's discretion.

2. Divorce 🔑312

Unless trial court's discretion in ruling on question whether custody of child of divorced parents shall be modified has been abused, his action will not be disturbed on appeal, and burden of showing an abuse of such discretion is on the appellant.

3. Divorce 🔑303(3)

Evidence sustained judgment modifying former custody order granting custody of children of divorced parents to the father, by awarding custody of the children to the mother during school months of the year and to the father during summer months. Civ.Code, § 138, subd. 1.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Jere B. Horsley against Edythe Horsley. From an order awarding custody of two minor children of the parties to the defendant, the plaintiff appeals.

Affirmed.

Gandy & Hurd, of Santa Monica, and C. V. Caldwell, of Los Angeles, for appellant.

Jerrell Babb, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County awarding custody of the two minor children of the parties to the mother during the school months of the year and to the appellant father during the summer months. For a number of years prior to the making of the order appealed from custody had been in the father.

The parties were married in 1934. The two children, a boy and a girl, were aged about 9 and 10 years, respectively, at the time of the hearing which resulted in the order appealed from. In 1937 the father brought an action for divorce in the Superior Court of Los Angeles County upon the ground of desertion. At the trial of the action the mother dismissed her cross-complaint, and after hearing evidence, the trial court denied plaintiff father a divorce. Thereafter the father secured a divorce in Nevada, remarried in 1940, and now resides with his present wife in Los Angeles.

The first order of custody shown in the record, made March 15, 1938, and based upon a recommendation of a court investigator, provided "that the father continue with the custody * * * that the mother may visit the children every Sunday morning * * * provided some third party is in the home at the time." Prior thereto, apparently, the children had been in the father's custody. At the time said order was made or shortly thereafter, the father placed the children in a home known as the California Kiddie Home.

In August, 1939, the mother made an application for modification, asserting that the plaintiff "is now living in the City of Reno, Nevada. Children are now in a public institution." It was then ordered that the father continue with the custody and that the children remain in the California Kiddie Home until further order, and that the parents might visit the children in accordance with the rules and regulations of that home.

In April, 1944, plaintiff father having sought modification of the existing custody order, the matter first came before the trial judge who made the order herein appealed from. It was at this time ordered that the children be placed in the Maude Booth Home in Los Angeles; that the parents alternate in having the children with them at such times as the children were permitted to leave school, and that "for this purpose the parents have joint custody of said children * * * without prejudice of amendment as to the custody of said children after a period of six months. * * *" In July, 1945, a further order was made that "custody of the children is now awarded to plaintiff until September 4, 1945, without prejudice."

On August 31, 1945, after hearing, upon application of the mother, the order herein complained of was made. This order provided that the mother "shall have the custody * * * during the school session months of each year, and that the plaintiff shall have custody of said children during the summer months * * * and this arrangement shall continue until the further order of the court."

It is contended in substance that the last-mentioned order is erroneous, in that by previous orders it had been conclusively determined that the father was a fit person and that the welfare of the children would be best served by placing them in the father's custody; that no showing was made which would warrant a change in custody; and that from the evidence adduced it affirmatively appears that the best interest of the children require that custody be continued in the father.

[1-3] The parties hereto were before the same trial judge on two previous occasions in connection with the same matter. It is well settled that orders relating to the custody and care of minors in such cir-

cumstances are not final. The question on each and every occasion is always addressed to the discretion of the trial court. And unless that discretion is abused, the action will not be disturbed on appeal. The burden in that regard is on appellant. In the within appeal, a review of the record reveals no reason for disturbing the judgment of the trial court.

The judgment is therefore affirmed.

YORK, P. J., concurs.

WHITE, Justice.

For a proper determination of whether the trial court in the instant case abused the judicial discretion reposed in it, I deem it advisable to here set forth in more detail than appears in the majority opinion, the factual background of this litigation as reflected by the record in the three proceedings wherein the parties were before the trial judge who made the order here complained of.

The evidence adduced at these hearings has been presented in the form of a settled statement. From such evidence it appears that after the unsuccessful termination of his divorce suit in California the father procured a divorce in Nevada in 1940, remarried, and has resided for some years in the Eagle Rock District of Los Angeles, where he is purchasing a home. The father testified that he was maintaining the children at his home with a housekeeper, but some time in 1938 placed them in the California Kiddie Home; that he and his second wife took the children out and had them at their home for dinner every Sunday; that the children were very fond of the present Mrs. Horsley. With reference to the condition of the girl, who had suffered from infantile paralysis, a doctor on the staff of the Orthopedic Hospital testified, in part: "She is ten years old now and is due to mature. Her epilepsy can be made much worse from this if she is not kept in a proper environment and kept away from excitement. She is where she could either become very much better or very much worse. * * * The child should have due opportunity to use that hand (partially paralyzed) or she will always be left-handed. A child with the hand that she has should be home where the father can do it. * * *"

A consulting psychologist testified that the children appeared happy with their father and his present wife; that the defendant mother was "constrained, nervous and irritable on two distinct occasions," in the presence of the children. The superintendent of the Kiddie Home testified that the father was cooperative; that the mother was not; that her attitude "is often very belligerent"; that she was critical of the children; that she took them to "a very upsetting war picture".

At the hearing in May, 1945, the husband introduced testimony of two social workers to the effect that the children were happy in their father's home; that the children seemed to prefer the father to the mother, and that the mother was not in a position to offer the children the advantages provided by their father. It also appeared that the mother had resided at about nine different addresses since June, 1944.

In August, 1945, in the proceeding which gave rise to this appeal, before the same judge who had heard the controversy at two previous hearings, the mother testified, in support of her application, that she now lived on Valley Boulevard in Puente, where she had a three-room apartment, and her own furniture; situated on 19 acres near the home of the owners thereof; "There is no fence around my back yard, but the entire nineteen acres is fenced. They have two children of their own, the boy is the exact age of my little girl, and the other is three months older than Jerry. Both of their children are boys. They are very nice children. Their mother is a school teacher, and their father works. He has been working in pictures in Hollywood, and they are both nice people. The mother is teaching in the Puente School this winter. I have to be caretaker of the place while they are both gone. I am in position to give aid to my children and help them with their school studies. I formerly taught school. I am not tied up, with the exception of a few chores and certain days that I do work for these people. * * * It is a country school. The children are taken on a bus. * * * There is no separate room for the children to sleep in. I guess we would all have to sleep in the living room, but I could make a separate place for the boy * * * in the room that is off the kitchen * * * no furniture in it * * * His bed would be folded up during the day. * * * I have that large room and the kitchen and the bathroom, and dressing room. * * *."

At the same hearing the father testified that he was buying the place in which they lived, about five blocks from a school; that the children go to church and Sunday-school; that the boy went every week to the nearby playground and belonged to the Boy Scout cubs. His present wife testified to the congenial atmosphere in the home, and this was corroborated by an intimate friend.

At the conclusion of this hearing the trial court said, in part: "* * * I have talked to the children. *Of course, their preference is to be with their father and step-mother; they so expressed themselves, just as they did before, there is no change.* I always will have to remember that Mrs. Horsley is the mother of the children. So the matter will be submitted." (Emphasis added). Following such submission, the court made the order herein appealed from.

By an unbroken line of authorities it is established that once jurisdiction attaches to grant a divorce and award custody of the minor children of the marriage, our statute provides that jurisdiction is continuing, and there ever after remains the power to amend, modify or annul an award of custody as existing conditions demand. Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719. But section 138 of the Civil Code provides that in the making or modification of any order of custody the court is to be guided by the following considerations: "By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

"As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

Because of this expressed legislative intent, the courts have uniformly held that the paramount concern in such a proceeding is the welfare and best interest of the child, and while recognizing the manifest intention of the legislature to confide to trial courts, in the disposition of the minor children of the parties to a divorce action, a very extensive discretion, appellate courts have nevertheless consistently held that the discretion with which trial courts are invested in such matters is a legal discretion, the exercise of which can be neither capricious nor arbitrary, but which must reflect the use of discriminating judgment within the bonds of reason and controlled by legal principles, the application of which will, in cases like the one now before us, tend toward the conservation of the highest and best interests of such minor children, keeping always in mind "What appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; * * *." (Civil Code, sec. 138, subd. 1).

To avoid the child's welfare being constantly unsettled and disturbed by recurring changes of his custody, to say nothing of the necessity of avoiding interminable and vexatious litigation, the courts have held that while a showing of "changed circumstances" is not an essential prerequisite to the making of an order changing the custody of a minor child, the trial court must exercise the broad legal discretion reposed in it upon evidence from which it appears that the best interest and welfare of the child will be conserved or enhanced by any action taken. It has therefore been ordained as a rule of practice, in every proceeding to modify a previously made order awarding custody of a minor child, that the burden is upon the moving party to satisfy the court that new facts considered in connection with those formerly established (Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049), justify the modification (Booth v. Booth, 69 Cal.App.2d 496, 500, 159 P.2d 93; Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295). I am not unmindful that, on appeal, the party who seeks a reversal of the order modifying or refusing to modify a previous custody award must carry the burden of showing that the trial court abused its wide but legal discretion to make such order for the minor's custody, or modify or vacate the same, in the light of what may to such court seem necessary or proper for the best interest of the child. Civ.Code, sec. 138, subd. 2; Foster v. Foster, 8 Cal.2d 719, 730, 68 P.2d 719; Peterson v. Peterson, 64 Cal.App.2d 631, 149 P.2d 206; Kelly v. Kelly, 75 Cal.App.2d 408, 171 P.2d 95.

But, so far as the evidence goes in the case at bar, there is not one iota to indicate that the children did not have the best of care from their father. In fact, all the evidence indicates they did have such care. Respondent mother, except for periods of visitation, has never had the actual custody of the children since the original order giving their custody to appellant father in 1938. All presumptions being in favor of the previous orders awarding and continuing custody in the father, the burden was on respondent to prove that appellant father is so unfit, or that other circumstances or considerations have intervened, which reasonably indicate that the best interests and welfare of the children would be endangered unless an order be made for change of custody, and it must be further shown by competent and convincing evidence that the best interests and welfare of the children will be directly enhanced or promoted by the change. Johnson v. Johnson, 72 Cal.App.2d 721, 724, 165 P.2d 552. I search the record in vain for any evidence indicating that appellant is or ever was unfit to care for the children or that their best interests or welfare will either be promoted or enhanced by giving their custody to respondent mother.

The only ground urged in respondent's affidavit upon which the order to show cause herein was issued is that she "has rented a 3-room house with modern bath facilities and toilet. Said place is in the County of Los Angeles and is equipped for raising chickens and garden. Defendant owns her own furniture for the house. Said house is near a good school which begins September 17, 1945. School bus picks children up right at the house and returns them. Defendant is well established in her new location. Defendant took said location on the advice of her attorney and is now well equipped to properly take care of the two children involved in this action. Environment for the children is excellent." These facts, slightly elaborated as to detail, were relied upon by respondent at the hearing in the court below. From her testimony it appears that in the three-room apartment there is one large room which could be used as a sleeping room for the mother and minor daughter. Respondent proposed to put the boy in a room used as a kitchen wherein there was no furniture for use by him in conjunction with his sleeping room. As heretofore indicated, respondent was to act as a caretaker for the house occupied by the owner of the nineteen acres upon which respondent was permitted to reside in the three-room apartment as aforesaid in return for the performance by her of the duties of caretaker of the entire premises.

I have heretofore narrated the testimony given at the hearing and will not now repeat it. Suffice it to say, that appellant father's affection for and devotion to the children was not challenged. The children themselves, when interviewed by the trial judge outside the presence of the parties, expressed, as they had in the past a desire to remain with their father. Disinterested witnesses testified as to the happiness and contentment of the children when with their father. As to the girl, Jean, who suffered an attack of infantile paralysis in 1935, it was shown that she was at the time of the hearing and prior thereto had been receiving treatments at the Orthopedic Hospital in Los Angeles since shortly after she suffered the attack. Who would take the child to the hospital for treatments while the mother was performing her work as caretaker of the premises upon which she lived was not made to appear.

A reading of the record convinces me that the trial judge abused his discretion in making the order appealed from, because no evidence was presented to him that the best interests and welfare of the children would be enhanced or promoted by the change in custody as ordered, but on the contrary, the evidence tended strongly to indicate that not only would the children's lives be unsettled, but their best interests and welfare would be adversely affected thereby.

The order appealed from should be reversed.

Hearing denied; SCHAUER, J., dissenting.

77 Cal.App.2d 306

PEOPLE v. ONE 1940 CHRYSLER ENGINE NO. C-28-10132 (ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al., Interveners).

No. 13124.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1946.

1. Constitutional law 🔑319
Forfeitures 🔑2

The statute providing for forfeiture of a vehicle used unlawfully to transport, deposit or conceal narcotics, is not unconstitutional as a denial of due process of law as applied to owner who entrusted automobile to a third person in instances in which the owner had no connection with, or knowledge of the intended wrongdoing of the third person who violated the law by transporting narcotics in such vehicle. Health and Safety Code, § 11610.

2. Forfeitures 🔑3

The taking of an automobile without the consent of owner and its use to transport narcotics against the will and knowledge of the owner is a defense available to owner in a forfeiture proceeding. Health and Safety Code, §§ 11012, 11610.

3. Forfeitures 🔑5

A higher degree of proof is required in a criminal case than is required in an action under a forfeiture statute.

4. Appeal and error 🔑994(3)
Evidence 🔑60, 89

The trier of the facts is the exclusive judge of the credibility of the witnesses and while a witness is presumed to speak the truth this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by his motives or obvious interest. Code Civ. Proc. § 1847.

5. Evidence 🔑594

The trier of the facts, provided he does not act arbitrarily, may reject in toto the testimony of a witness, even though the witness is uncontradicted.

6. Forfeitures 🔑5

Evidence which established that narcotic was in automobile with the knowledge either of the owner or the occupant or both, was sufficient to justify forfeiture of the automobile, notwithstanding the owners and occupants' denial of the narcotics' presence. Health and Safety Code, §§ 11012, 11610.

7. Forfeitures 🔑5

When narcotics are found concealed in or about an automobile, at least where such automobile is in the possession of the owner or his entrustee, trial court in forfeiture action may infer knowledge on part of the owner of presence of the narcotics, and such facts are sufficient to cast the burden of going forward with an explanation of the presence on the owner. Health and Safety Code, §§ 11012, 11610.

8. Forfeitures 🔑5

In forfeiture action for unlawfully transporting marihuana in automobile, judgment of forfeiture was required to be reversed where no finding was made by the trial court on the issue of knowledge, on part of owner or person to whom automobile was loaned and who had possession of the automobile when the marihuana was found, of the presence of marihuana in the automobile, notwithstanding the sufficiency of the evidence to support the judgment. Health and Safety Code, §§ 11012, 11610.

9. Appeal and error 🔑1071(6)
Trial 🔑391

Where an action is tried before the court without a jury, findings are required on all material issues raised by the pleadings and evidence unless they are waived, and if the court renders judgment without making findings on all material issues, the judgment must be reversed.

10. Forfeitures ⚷5

Where judgment of forfeiture of a motor vehicle was required to be reversed for absence of a finding on issue of knowledge of owner or occupant of automobile of presence of narcotics therein, trial court could make the required finding either upon the evidence in the record or if the court desired additional evidence upon that issue, it might receive it. Health and Safety Code, §§ 11012, 11610.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Proceeding by the People for the forfeiture of One 1940 Chrysler Engine No. C–28–10132, on the ground that the automobile was used to unlawfully keep, deposit, conceal, convey, carry or transport marihuana, wherein Anglo California National Bank of San Francisco, a corporation, intervened as the legal owner, and Mack Pennewell intervened as the registered owner. From an adverse judgment, intervenors appeal.

Judgment reversed with directions.

Robert G. Partridge and Remington Low, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

At about 10:45 p. m. on September 20, 1944, two police officers observed a negro woman named Barbara May Reader and a sailor getting into a parked 1940 5-passenger Chrysler coupe automobile on Lewis Street between 3rd and 5th Streets in Oakland. The officers circled the block in their automobile and came up behind the Chrysler and the woman and the sailor were then seated in the back seat. The officers asked the couple to get out of the car and made a search of the automobile and also of the occupants. On the floor under the rubber floor mat on the left hand side in front of the driver's seat they found two marihuana cigarettes, but they found none on the person of either of the occupants, and both occupants denied any knowledge of any marihuana cigarettes in the car. Miss Reader had the keys to the car, which was registered in the name of the intervenor Mack Pennewell. Also on the back seat of the car were some coats and other things. Later, about 2 a. m., the officers found Pennewell at the Clover Club on 7th Street in West Oakland. He denied any knowledge of the marihuana cigarettes being in the car, but admitted that Miss Reader was a friend of his and that he had loaned her the car about 3 o'clock on the previous afternoon as she wanted to do some shopping; that she was to be back in an hour, but did not return; that he gave her the keys to the car. On cross-examination Pennewell admitted that he had been convicted of a felony in connection with the sale of marihuana but the date of such conviction was not shown.

Notice of seizure and intended forfeiture was served upon Pennewell as the registered owner and upon Anglo-California National Bank as the legal owner of the said automobile, it being alleged that "said vehicle was used to unlawfully keep, deposit, conceal, convey, carry or transport narcotics, to-wit: Marihuana, or said narcotics were unlawfully possessed by an occupant thereof * * *."

Appellant bank and Pennewell intervened and filed answers denying any knowledge that said automobile was to be used by anyone for the transportation of any narcotic drugs or the granting of permission to anyone to so use it. The appellant bank was unable to show that it had made a reasonable investigation of the character, reputation and moral responsibility of Pennewell, the registered owner, and the court found that no such investigation was made. From the judgment of forfeiture entered by the court both intervenors have appealed, but no issue of any right in the bank independent of the state's right to forfeit Pennewell's interest in the automobile is involved upon this appeal.

Section 11610 of the Health and Safety Code provides as follows: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State." The succeeding sections state the procedure by which a judgment of forfeiture may be obtained. Section 11012 of the same code provides: "'Transport,' as used in this division, with reference to narcotics, includes 'conceal,' 'convey,' or 'carry.'"

[1] Appellant first attacks the constitutionality of section 11610 and argues that said section, "insofar as it pertains to the keeping, depositing or concealing of narcotics is unconstitutional since it provides for the deprivation of property without due process of law." This contention requires only brief mention because the constitutionality of said section has been upheld in numerous decisions in which forfeitures have been sustained against owners who had entrusted vehicles to third persons, even in instances in which the owners had no connection with or knowledge of the intended wrongdoing of such third persons who afterwards violated the law by transporting, concealing, etc., narcotics or other contraband in such vehicles. Van Oster v. State of Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; People v. One Ford V-8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908; People v. One Ford Coupe, 10 Cal.App.2d 321, 51 P.2d 882; People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, 162 P.2d 653.

[2] If an automobile is taken without the consent of the owner, and used to transport, conceal, etc., narcotics against the will and knowledge of such owner, this will constitute a defense available to him in a forfeiture proceeding. People v. One 1937 Plymouth 6, 4-Door Sedan, 37 Cal. App.2d 65, 98 P.2d 750; People v. One 1941 Buick Sport Coupe, Cal.Sup., 171 P. 2d 719. Although that defense is not contained in the statute, it has been implied by the court to preserve the constitutionality of the statute. People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641; People v. One 1941 Chrysler Tudor, supra; People v. One 1941 Buick Sport Coupe, supra.

As was said by our Supreme Court in People v. One 1941 Ford 8 Stake Truck, supra, 26 Cal.2d at page 507, 159 P.2d at page 643, "Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded."

We therefore hold that the contentions of appellants that section 11610 is unconstitutional are without merit.

Appellants next contend that there is no evidence that either Pennewell or Miss Reader had any knowledge that marihuana was in the automobile and that, therefore, the evidence is insufficient to sustain the judgment of forfeiture. Appellants argue that "before an automobile in which narcotics are kept, deposited or concealed can be forfeited, it must be shown that the owner had knowledge of the presence of the narcotics."

In support of this contention appellants rely strongly upon the recent case of People v. One 1941 Buick Sport Coupe, supra. In that case the trial court found the following facts: That the vehicle was seized while in the possession of the registered owner; that in the car with him at that time were James Taylor, an acquaintance of his, and another passenger whose name does not appear in the record; that the three occupants "Were enroute to attend a theatre at the time of the seizure of said vehicle and the arrest of said James Taylor and said registered owner; that at said time while an occupant of said car the same James Taylor had in his possession marihuana cigarettes; that said possession was without the knowledge of said registered owner * * *."

After first rendering a judgment in favor of the owners and ordering the automobile returned to them, the trial court, upon motion, vacated the judgment and entered a new judgment forfeiting the vehicle to the State upon the same findings. In reversing the judgment our Supreme Court said at page 721 of 171 P.2d: "It has been held that 'there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use.' People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 507, 159 P.2d 641; see, also, People v. One 1933 Plymouth [Sedan Deluxe] Automobile, 13 Cal.2d 565, 568, 90 P.2d 799; Van Oster v. State of Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; United States v. One Lincoln Touring Car, D.C., 11 F.2d 551. Justification for the confiscation under such circumstances has been placed upon the ground that 'certain uses of property may be regarded so undesireable that the owner surrenders his control at his peril.' Van Oster v. State of Kansas, supra, 272 U.S. at page 467, 47 S.Ct. at page 134, 71 L.Ed. 354, 47 A.L.R. 1044. But property taken from the owner without his consent stands in a different category, and the Health and Safety Code has been construed as not authorizing the confiscation of a stolen automobile. 'The reasoning leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property without due process of law (People v. One 1937 Plymouth 6, § 37 Cal.App.2d 65, 98 P.2d 750), and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation.' People v. One 1941 Ford 8 Stake Truck, supra, 26 Cal.2d at page 506, 159 P.2d at page 642; see, also, United States v. One Buick Roadster, D.C., 280 F. 517; United States v. One Ford Coupe Automobile, D. C., 21 F.2d 639.

"The line of demarcation established by these decisions is that if the owner has not consented to the use of his property, the government may not confiscate it. But if consent has been given forfeiture is allowed regardless of the owner's lack of knowledge of or consent to the unlawful use. People v. One 1937 Plymouth 6, 37 Cal.App.2d 65, 70, 98 P.2d 750. 'An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner.' People v. One 1941 Ford 8 Stake Truck, supra, 26 Cal.2d at page 507, 159 P.2d at page 642. These distinctions rest upon the fundamental principle that, to justify the forfeiture of property, there must be some connection, either by agency, consent to operate or control the vehicle, knowledge, negligence, or connivance, between the owner of the seized vehicle and the person committing the crime. People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 422, 147 P. 2d 49; Peisch v. Ware, 4 Cranch 347, 8 U.S. 347, 2 L.Ed. 643; United States v. One Haynes Automobile, D.C., 290 F. 399; The Cargo Ex Lady Essex, D.C., 39 F. 765, 767.

"As the findings of fact in the present case declare that, at the time the state seized the automobile it was in the possession of Marquez and under his control and that he had no knowledge of the unlawful conduct of Taylor, there is no basis for the judgment of forfeiture."

We do not regard the foregoing case as determinative of the issue of the sufficiency of the evidence in the instant case as the facts are different. In the Buick Sport Coupe case the narcotics were found on the person of an occupant of the car other than the owner, and the trial court found that the owner was in possession and control of the automobile and had no knowledge of the possession of the marihuana cigarettes by the occupant. In the instant case the marihuana cigarettes were found under the floor mat in the automobile which was in the possession of Miss Reader, to whom Pennewell, the owner, had loaned the automobile.

The question which we have to determine here is whether or not there is sufficient evidence in the record to support a finding that either Pennewell or Miss Reader had knowledge of the presence of the marihuana in the automobile. Unless the evidence, and the inferences that may reasonably be drawn therefrom, are sufficient to prove such knowledge, the judgment of forfeiture must be held to be unsupported. As is said in 23 Am.Jur. 616, § 19: "Upon an information to forfeit property, it has been held that it is not necessary that the matters charged be proved beyond a reasonable doubt." And at page 644 of the same volume it is stated: "The rule is well settled that a proceeding to recover a statutory penalty is ordinarily civil in nature * * *."

[3] While a higher degree of proof is required in a criminal prosecution than is required in an action under a forfeiture statute, we believe that an analogy may be drawn between the instant case and the recent case of People v. Gory, 170 P.2d 433, in which our Supreme Court held that the jury must be convinced that one accused of possessing a narcotic found in a cache on his premises or within reach of his habitation must have knowledge of the presence of such narcotic and that such knowledge is the essence of the crime of possession under the narcotic act. That case involved a prosecution under Health and Safety Code sec. 11160 (wilfully, unlawfully and feloniously possessing marihuana). Defendant was a prisoner in a prison farm. The evidence showed that each prisoner was supplied with a small metal box for the storage of toilet articles. Those containers were left unlocked alongside of the beds of their respective owners in the bunkhouse in which defendant was housed with some thirty other prisoners. Marihuana was discovered in defendant's metal container. Defendant disclaimed any knowledge concerning how the marihuana got into his box. A judgment of conviction was reversed on the ground that the trial court had refused to instruct the jury that before defendant could be found guilty of unlawful possession of the marihuana, he would have to be possessed of knowledge of the presence of such narcotics among his belongings. The court said at page 437 of 170 P.2d: "Thus instruction 12 invoked the element of knowledge in the sense of defendant's awareness of the presence of the marijuana in the box given him for the storage of his personal effects at the prison farm and so presented to the jury an issue of fact determinative of defendant's guilt or innocence of the possession prohibited by statute.

"The importance of proper instructions on the question of defendant's possession of the forbidden property is readily apparent from the record in this case. Matters tending to establish defendant's guilt are the fact that the marijuana was found in his box and the circumstance of his silence in the face of Officer Huber's accusation in the camp's bunkhouse. (8 Cal. Jur. 103, and cases there cited.) Matters tending to establish defendant's innocence are the fact that the box was unlocked, showing that the marijuana conceivably could have been placed there by someone other than defendant, and defendant's denial at the trial that he had ever seen the 'stuff' prior to its discovery by the officers. Thus, this may be said to be a 'close case' on the record before us. * * * [p. 437] Here the principal fact relied upon by the prosecution is the finding of marijuana in defendant's unlocked box and because of the denial by defendant of knowledge of its presence there, it was the duty of the trial court, on proper instructions, to submit to the jury the question as to whether defendant had knowledge of the presence of the marijuana. People v. Gin Shue, 58 Cal.App.2d 625, 628, 137 P.2d 742. To fail to instruct on that point might well have misled the jury into believing either that knowledge was not essential or that any object found among defendant's personal effects was conclusively presumed to be there of his own knowledge. The error which would be involved in an express declaration to that effect is obvious, for knowledge is essential and though the finding of an object among defendant's effects would support an inference, it would not give rise to a conclusive presumption that the object was there with defendant's knowledge."

We believe that it is clear from the opinion in the Gory case that if the jury had been properly instructed as to the necessity of proving knowledge by defendant of the presence of the marihuana, the conviction would have been sustained, as the court states that "Though the finding of an object among defendant's effects *would support an inference,* it would not give rise to a conclusive presumption *that the object was there with defendant's knowledge.*" (Emphasis added.)

Applying the reasoning of the Gory case to the instant case, we believe that the evidence is sufficient to support the judgment of forfeiture. As already set forth the marihuana cigarettes were found under the rubber floor mat on the left hand side in front of the driver's seat at about 10:45 p. m. The automobile had been loaned by Pennewell to Miss Reader about 3 p. m. and she had had it during the intervening period. Pennewell testified that she stated that she wanted to do some shopping and would be back in an hour. The car was parked on Lewis Street and in view of the facts that Miss Reader had coats, a douche bag and other things on the back seat of the car, and also had the keys to the car, there can be little doubt that the car was locked when Miss Reader entered it with the sailor whom she had picked up at the nearby bar. The officers saw them enter the car and saw them sitting in the back seat. After asking them to get out of the car, the officers immediately searched the car and found the marihuana cigarettes in the car but none on the person of either Miss Reader or the sailor, both of whom denied knowledge of its presence. The record shows that Pennewell had known Miss Reader for about three months; that she was a "regular customer" at the Sea Cave Cafe where he was bartender; that she was a good friend of his; that they had drunk together, exchanged letters, and had also talked together "sometimes" at the Clover Club, a negro club on 7th Street, after he got through work at midnight; that when Pennewell was found by the police officers at 2 a. m. he was waiting at the Clover Club for Miss Reader. Miss Reader was not a witness at the trial but Pennewell denied all knowledge of the presence of the marihuana in the car. He admitted, however, upon cross-examination, that he had been previously convicted of a felony in connection with the sale of marihuana.

[4-7] We believe that the foregoing evidence was sufficient to support an inference that the marihuana was in the automobile with the knowledge of either Pennewell or Miss Reader, or both. It is true that Pennewell denied at the trial, and Miss Reader denied to the officers, that they had any knowledge of the presence of the marihuana, but the trial court was not bound to believe this testimony. As this court said in People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, at page 315, 162 P.2d 653 at page 655, "The trier of the facts is the exclusive judge of the credibility of the witnesses, and while a witness is presumed to speak the truth, this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by his motives or obvious interest. § 1847, Code Civ.Proc.; see cases collected 27 Cal.Jur. p. 179, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America Nat. Trust & Sav. Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99." The denials by Pennewell and Miss Reader only created a conflict in the testimony and presented to the trial court an issue of fact as to whether they, or either of them, had knowledge of the presence of the marihuana. We think the true rule is that when narcotics are found concealed in or about an automobile, at least where such automobile is in the possession of the owner or his entrustee, the trial court may infer knowledge on the part of the owner. Such facts are sufficient to cast the burden of going forward with an explanation on the owner. The sufficiency of such explanation is for the trial court.

Appellants suggest that the parked car may have been used by some third person to conceal the marihuana without the permission of appellants or Miss Reader. This was, of course, a consideration to be weighed by the trial court in the light of all of the evidence and the surrounding circumstances. There was, however, no evidence introduced that would lend weight to such a conclusion, and, in the absence of some evidence pointing toward its probability, it would seem highly improbable that some stranger would attempt to conceal marihuana in a parked car that he chanced to see unless he were hotly pursued by the officers and wished to abandon the contraband. We are, therefore, of the opinion that the evidence in the instant case was sufficient to prove at least prima facie that appellant Pennewell and Miss Reader, or both, had knowledge of the presence of the marihuana cigarettes in said automobile. Our attention has been called to no case, and we know of none, in which a judgment of forfeiture has been reversed upon the ground of the insufficiency of the evidence, where the automobile was in the possession and control of the owner or his entrustee, and the owner or his entrustee was in the automobile at the time the contraband narcotic was found concealed therein.

It is true that there is language in People v. Bledsoe, Cal.App., 171 P.2d 950, somewhat at variance with the views herein expressed. Insofar as that case holds that the explanation or denial of the owner in possession must be believed as a matter of law, such holding is directly contrary to the holding in People v. Gory, supra, upon which the opinion is based. We think the Gory case states the proper rule.

[8] The final contention of appellants is that the trial court failed to make any finding that either Pennewell or Miss Reader had any knowledge of the presence of the marihuana in the automobile. An examination of the findings reveals that no such finding was made. What we have hereinbefore said as to the sufficiency of the evidence does not eliminate the necessity of such a finding. Appellants were entitled to a finding upon the important and material issue of knowledge, and there was a clear conflict in the evidence upon that issue.

[9] It is the settled law in California that where an action is tried before the court without a jury, findings are required on all material issues raised by the pleadings and the evidence, unless they are waived, and that if the court renders judgment without making findings on all material issues, the judgment must be reversed. James v. Haley, 212 Cal. 142, 147, 297 P. 920. See also cases cited in 23 McKinney's New Cal.Dig., p. 577, sec. 286; Powell v. Johnson, 50 Cal.App.2d 680, 123 P.2d 875.

[10] The absence, therefore, of a finding upon the issue of knowledge of the presence of the marihuana requires a reversal of the judgment and the making of a finding upon that issue. This the trial court may do either upon the evidence now in the record, or if the court desires additional evidence upon that issue, it may receive it. However, no additional evidence is necessary upon the remaining issues. See Panama Mail S. S. Co. v. Vargas, 281 U.S. 670, 50 S.Ct. 448, 74 L.Ed. 1105; Lane v. Safeway Stores, 33 Cal.App.2d 169, 91 P.2d 160.

In view of the foregoing the judgment is reversed with directions to the trial court to make a finding upon the issue of whether or not Pennewell or Miss Reader, or both, had knowledge of the presence of the marihuana in said automobile, and that said finding be made either upon the present record, or if the court desires additional evidence upon such issue, then upon such additional evidence, and that judgment then be entered in accordance with said findings as amended and the views hereinbefore set forth.

PETERS, P. J., and WARD, J., concur.

77 Cal.App.2d 377

FIDELITY METALS CORPORATION v. RISLEY et al.

Civ. 7300; Sac. 5791.

District Court of Appeal, Third District, California.

Dec. 20, 1946.

1. Corporations 🔑661(1), 691

Where Nevada corporation lost its right to do business in California for failure to pay franchise tax and had its charter revoked in Nevada for failure to file list of officers and directors and to pay filing fee and penalty, and Nevada three-year limitation on right of dissolved corporation to wind up affairs expired before California action to quiet title was commenced, corporation had no capacity to sue or to take an appeal from an adverse decision, notwithstanding a certificate of revivor of its California rights issued upon payment of California franchise tax. Comp.Laws Nev. §§ 1664, 1804–1809; Gen.Laws, Act 8488, § 32.

2. Corporations 🔑617(1), 691

The effect of dissolution of a corporation or its expiration otherwise depends upon law of its domicile, and a defunct foreign corporation has no greater capacity to commence or maintain an action in state of the forum than it would have in state of its domicile.

3. Corporations 🔑599, 617(1), 618

The Nevada statute depriving a corporation of its charter for failure to file required list of officers and directors and to pay filing fee is a self-executing law, and a noncompliance with its provisions ipso facto deprives corporation of its charter and its right to do business within the state or bring any suit except as provided by section authorizing a dissolved corporation to wind up its affairs within three years. Comp.Laws Nev. §§ 1664, 1804-1809; St. 1905, p. 493, as amended.

4. Corporations 🔑630(1)

A defense that corporate plaintiff has no capacity to sue because its charter has been revoked, supported by direct proof of revocation, is not a "collateral attack" upon plaintiff's status in the sense of being merely incidental to the cause of action or a defense.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

5. Corporations 🔑691

Where Nevada statute worked an automatic forfeiture of charter of Nevada corporation, that fact must be recognized and given effect by courts of California in a subsequent action commenced in California by such Nevada corporation. Comp. Laws Nev. §§ 1804–1809.

6. Corporations 🔑617(1), 691

The code section relating to powers of a dissolved corporation relates only to domestic corporations, and, even if it could be deemed to apply to foreign corporations, it could not be held to apply to a corporation which has been penalized for failure to comply with requirements of a different statute which specially covers the subject. Civ.Code, § 399.

7. Corporations 🔑617(1)

The purpose of code section relating to powers of dissolved corporations is to limit, rather than to enlarge, powers of such corporations. Civ.Code, § 399.

◆

Appeal from Superior Court, Siskiyou County; Albert F. Ross, Judge.

Action by Fidelity Metals Corporation against Berl Risley and others to quiet title to certain land. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

Tebbe & Correia and Floyd Merrill, all of Yreka, for appellant.

Buffum & Postlethwaite, of Yreka, and Robert H. Schwab, of Sacramento, for respondents.

PEEK, Justice.

Plaintiff, a Nevada corporation, appeals from an adverse judgment in an action to quiet title to certain real property which plaintiff allowed to be sold to the state for taxes, and which thereafter was sold by the state to defendant.

Defendant now has moved to dismiss said appeal on the ground that the plaintiff is without capacity to sue or prosecute the same by reason of the fact that prior to the commencement of this action its charter was revoked and has not been reinstated by the state of Nevada for failure to pay certain corporate taxes in that state.

The record discloses that the plaintiff was incorporated in the State of Nevada on October 22, 1929, was authorized to do business in California on September 21, 1936, and sometime thereafter acquired the real property which is the subject of this controversy. On January 6, 1938, plaintiff, having become delinquent in the payment of its franchise tax, forfeited its right to do intrastate business in this state under the provisions of section 32 of the Bank and Corporation Franchise Tax Act, Stats. 1937, p. 2348, Deering's General Laws, Act 8488.

The plaintiff likewise failed to pay the property taxes assessed against the premises in question, and on June 30, 1942, the property was sold to the state. Defendant acquired the property by tax deed from the state on December 30, 1943.

On December 2, 1944, the plaintiff brought this suit to set aside said sale to defendant on the ground, principally, that the requisite notice of sale had not been given to the plaintiff by the tax collector. After the filing of defendant's answer but prior to the trial of the action, to-wit, December 18, 1945, the Franchise Tax Commissioner issued to the plaintiff corporation a certificate of revivor, reciting that payment had been made of the franchise taxes, penalties and interest due, owing and unpaid to the state, and certifying that the corporate powers, rights and privileges of the corporation or its right to do intrastate business in the state were revived and restored to full force and effect.

During the course of the hearing plaintiff, over objection, introduced in evidence said certificate of revivor, and the defendant likewise, over objection, introduced in evidence two certificates executed by the secretary of state of the state of Nevada showing that the charter of the plaintiff corporation had been revoked on the first Monday of March, 1938. Said certificates further disclosed that such action was taken pursuant to and in accordance with the provisions of chapter 180 of the 1925 statutes of Nevada, as amended, N.C.L., secs. 1804–1809, in that said corporation failed to file a list of its officers, directors, etc. for the period of 1937–1938, and to pay the filing fee therefor and penalty, and that its charter has never been reinstated. Defendant thereupon asked leave to amend his answer to conform to proof with respect to the corporate existence of the plaintiff and its capacity to prosecute the action and further moved to dismiss the proceedings. The motion to dismiss was denied but leave was granted to so amend said answer. The court having denied defendant's motion to dismiss, the cause was heard on the merits and at the conclusion thereof findings of fact on all material issues were entered in favor of defendant, including findings that the plaintiff did not have corporate capacity to sue either in Nevada or in this state, and that both of the sales of real property, i. e., to the state and from the state to defendant, were valid. After plaintiff's appeal had been filed in this court, defendant moved to dismiss the same primarily on the ground that the plaintiff, being a defunct corporation in its domiciliary state, likewise had no existence in this state and therefore had no standing to prosecute this action.

Plaintiff adduced no evidence either to show a compliance with the Nevada statutes or to contradict or explain in any particular the showing made by defendant relative to its corporate status in that state. In this regard it is plaintiff's contention that the revocation of its charter in Nevada did not work an ipso facto forfeiture of its right to sue but that such right depends solely upon California law which would authorize such a suit as this in the case of a domestic corporation. We find no merit in such contention.

Chapter 180 of the 1925 statutes of Nevada, as amended, requires every corporation organized under the laws of that state to file annually with the secretary of state a list of its officers and directors and to pay a filing fee therefor, and imposes a penalty on a defaulting corporation which fails to comply with these requirements within a designated time. In addition, it is provided that the secretary of state, on or before the 15th day of October of each year, shall file with the governor of the state a complete list of all defaulting corporations, together with the amount of the filing fee, penalties and costs remaining unpaid, and that for at least ten days prior to the first Monday in November following, the governor is charged with the duty of publishing such list in the official newspaper and his proclamation to the effect that unless the filing fee together with penalties and costs shall be paid on or before the first Monday in March following, such defaulting corporation shall forfeit to the state the amount of the tax, penalties and costs, shall forfeit its right to carry on business within the state, "and, further, that the charters of all defaulting domestic corporations will be revoked unless payment is made as aforesaid." The statute then provides that "Immediately after the first Monday in March the governor shall file with the secretary of state a full and complete list containing the names of all corporations whose right to do business has been annulled and whose charters have been revoked. The secretary of state shall forthwith notify the several county clerks in whose offices the articles of incorporation which have been forfeited are on file and shall also by letter addressed to its president or secretary notify each corporation of the forfeiture of its charter."

By a general statute of the state of Nevada, N.C.L., sec. 1664, it is provided further that "All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for the term of three years from such expiration or dissolution be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established."

[1] As far as the plaintiff corporation is concerned, the period of limitation prescribed by this statute expired several years before the commencement of this action.

[2] It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile (Restatement, Conflict of Laws, pp. 228, 229, sec. 158; 20 C.J.S., Corporations, §§ 1899, 1900 pp. 128, 129), and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of the forum than it would have in the state of its domicile. Anderson v. Derrick, 220 Cal. 770, 775, 32 P.2d 1078; Yager v. Superior Court, 139 Cal.App. 84, 86, 87, 33 P.2d 451; Seth v. Lew Hing, 125 Cal.App. 729, 733, 734, 14 P.2d 537, 15 P.2d 190; Chicago T. & T. Co. v. Forty-One Thirty-Six W. Corporation, 302 U.S. 120, 124–128, 58 S.Ct. 125, 82 L.Ed. 147; Indian Protective Ass'n v. Gordon, 34 App. D.C. 553, aff'd 225 U.S. 698, 32 S.Ct. 839, 56 L.Ed. 1262; Merchants Loan & Trust Co. v. Clair, 107 N.Y. 663, 14 N.E. 414, 415.

[3] Likewise it seems clear that chapter 180 of the Nevada statutes of 1925, as amended, is a self executing law, and that a non-compliance with its provisions ipso facto deprives the corporation of its charter and its right to do business within the state, or bring any suit, except as provided by section 1664, supra. Indeed the language of this statute is in many respects identical with that employed in the California License Tax Act of 1905, Stats. 1905, p. 493, as amended in 1906 and 1907, which our Supreme Court held to be self-executing in the case of Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 648, 649, 103 P. 341, 345, wherein the court stated:

> "We concede the claim that the act should be construed against such ipso facto forfeiture if the language used is fairly susceptible of such interpretation, but we are satisfied that it is not so susceptible. * * * The language used is irreconcilable, under the decisions in this state, with any other theory than that of ipso facto forfeiture, and the whole frame of the act is in support of this theory."

This also appears to be the purport of the Nevada decisions. Thus the Supreme Court af Nevada has held that a corporation which has forfeited its charter under said statute, must be deemed to have expired by its own limitation, within the meaning of section 1664, and that it is dead for all purposes except that it has a right for a period of three years after the date of forfeiture of its charter to dispose of its property. Porter v. Tempa Min. & Mill. Co., 59 Nev. 332, 93 P.2d 741, 743–745. Likewise said court has stated that "it is after the expiration of the three years that the corporation no longer exists for any purpose." Seavy v. I.X.L. Laundry Co., Nev., 108 P.2d 853, 855, 856.

[4] Plaintiff, in support of its contention that its failure to comply with the laws of Nevada does not preclude it from bringing this action, cites the case of Buhler v. Maddison, 105 Utah 39, 140 P.2d 933, 936. However, it should be noted that the portion of the Buhler opinion quoted by plaintiff is mere obiter dictum for the reason that the status of the Nevada corporation therein involved was only collaterally attacked and, as the Utah court stated, no proof was offered "that the corporate charter had been suspended or revoked." In the case at bar direct proof was furnished of the revocation of plaintiff's charter, and defendant's attack is not collateral in the sense of being merely incidental to the cause of action or a defense.

Furthermore, it should be noted that the case of Porter v. Tempa Mining & Milling Co., supra, cited and relied upon by the Utah court as authority for its observation that the Nevada statute was a revenue act, not alone held that it was a revenue act but further stated at page 744 of 93 P.2d that it was also "* * * a police power act."

[5] Since, as we have concluded, the Nevada statute worked an automatic forfeiture of plaintiff's charter prior to the commencement of this action, and this fact must be recognized and given effect by the courts of this state, it follows that plaintiff was without capacity to bring or maintain this suit. "Unless a statute otherwise provides, a corporation after dissolution is incapable of suing or being sued as a corporation or in the corporate name." 6A Cal. Jur., p. 1506, sec. 889.

[6, 7] Although plaintiff contends that section 399 of the Civil Code authorizes the maintenance of such a proceeding as this, it is clear that said section has no applicability to a case of this kind. Even if it could be deemed to apply to foreign corporations, despite its apparent relation only to domestic corporations, as to which alone our laws may make provision for winding up and dissolution, still it could not properly be held to apply to a corporation which has been penalized for failure to comply with the requirements of a different statute which specially covers the subject. Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 20, 68 P.2d 968. The purpose of section 399 is not to enlarge the powers of a dissolved or expired corporation but rather to limit them. Boyle v. Lakeview Creamery Co., supra, 9 Cal.2d at page 20, 68 P.2d 968.

Finally, the plaintiff corporation, having had no right to institute this proceeding, likewise has no right to appeal from an adverse decision. Boyle v. Lakeview Creamery Co., supra, 9 Cal.2d at page 20, 68 P.2d 968; 6A Cal.Jur., p. 1469, sec. 364.

The motion to dismiss the appeal is granted and the appeal is dismissed.

ADAMS, P. J., and THOMPSON, J., concur.

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77 Cal.App.2d 520

PEOPLE v. WELLS.

Cr. 1980.

District Court of Appeal, Third District, California.

Dec. 31, 1946.

Criminal law 🔑274

Denial of defendant's motion to change plea of guilty to not guilty was not abuse of discretion, where guilty plea was not entered by reason of duress, fraud, or any overreaching of defendant's free will and judgment, and defendant had had benefit of advice of counsel of his own choosing, and was not entirely unfamiliar with criminal procedure, and had made admissions of guilt but made no offer to produce at trial on merits any evidence which would tend to prove that he was not guilty.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Glen Paul Wells was charged with a violation of section 266g of the Penal Code, in that he had persuaded his wife, a minor of the age of seventeen years, to enter a house of prostitution for the purpose of prostitution. Defendant's motion to change his plea of guilty and enter a plea of not guilty was denied, and judgment was entered, and he appeals.

Affirmed.

Harold Wyatt, of Stockton, for appellant.

Robt. W. Kenny, Atty. Gen., Jas. O. Reavis, Deputy Atty. Gen., and Chester E. Watson, Dist. Atty., and Casey C. Carr, Asst. Dist. Atty., both of Stockton, for respondent.

ADAMS, Presiding Justice.

On this appeal the only question for decision is whether the trial court abused its discretion in refusing to permit defendant to change his plea of guilty and enter a plea of not guilty. Defendant was charged with a violation of section 266g of the Penal Code in that he had persuaded his wife, a minor of the age of seventeen years, to enter a house of prostitution for the purpose of prostitution. At the preliminary hearing where defendant was represented by an attorney of his own choosing, the wife testified in support of the allegations of the complaint. On arraignment before the superior court defendant appeared with his attorney, but the latter, after he had conferred with defendant, informed the court that he no longer represented him but would go ahead with the arraignment. Thereupon the following occurred:

"Mr. Carr [Deputy District Attorney]: Well, under those circumstances, Your Honor, it might be well to get another attorney appointed to go ahead with it if he hasn't means with which to hire one, rather than have him arraigned.

"The Court: Mr. Wells, have you any means with which to hire a lawyer?

"The Defendant: I don't think I'll need one, Your Honor. I want to plead guilty and ask to refer me—

"The Court: You want to waive a lawyer?

"The Defendant: No, sir.

"The Court: You want to waive the services of a lawyer, you don't want the services of a lawyer, is that right?

"The Defendant: Yes, that is right.

"The Court: Very well, you may proceed with the arraignment, Mr. Clerk."

Then a copy of the information was handed to defendant and it was read to him, after which the following transpired:

"The Court: What is your plea, guilty or not guilty?

"The Defendant: Guilty, Your Honor.

"The Court: You have a right to wait at least two days before having judgment pronounced, or you can waive time, what do you wish?

"The Defendant: I would rather wait two days, I guess, and see the Probation Officer about this.

"The Court: Well, nothing will be gained, if you want the matter referred to the Probation Officer, in continuing the matter two days. If it is your desire to have the matter referred to the Probation Officer, I suggest you will gain time by proceeding now.

"Mr. Carr: In other words, Mr. Wells, it isn't referred to the Probation Officer until—

"The Court (Interposing): It is up to you. If you want it continued two days, that is all right.

"The Defendant: Continue it two days, then.

"The Court: All right. Continued until Saturday morning. The defendant is remanded in the meantime.

* * * * * *

"Mr. Carr: Your Honor, I believe Mr. Wells has changed his mind and he wants to take his sentence now. Is that right, Mr. Wells?

"The Defendant: Yes, sir.

"Mr. Carr: And ask that the matter be referred to the Probation Officer. Is that right?

"The Defendant: Yes."

A sworn statement was then taken from the defendant in which he admitted that he had been convicted of burglary in 1941 and sentenced to a reform school in Texas, but stated that he had been granted probation. He also testified to service in the armed forces with an honorable discharge, after which he had married and brought his wife to California in January or February, 1946. He admitted that since that time his only activities had been those of a gambler, and that he had received money from his wife's prostitution; that he was addicted to alcoholism. The matter was then referred to the probation officer.

On May 29th defendant appeared with an attorney, the matter was continued, and on June 5th the probation officer made an unfavorable report. A report by a psychiatrist was also filed. Probation was denied, whereupon defendant's attorney moved the court for an order permitting defendant to withdraw his plea of guilty and enter a plea of not guilty, and in support thereof put the defendant on the stand.

During the course of the examination of defendant which followed he stated that when he had employed his former attorney he had paid him a fee of $102 and understood that the attorney would see him through the entire matter; that when he entered his plea of guilty he did not feel that he was guilty and still felt that he was not; that he entered such plea because he did not have any more money; that he understood that the court would appoint an attorney for him, but that it seemed that everybody in the jail said that the lawyers the court appointed "probably would work against you more than for you"; also that he did not want his mother to find out; that he was "always scared in the courts." At the conclusion of his testimony the court said:

"The Court: Q. You consented that your wife practice prostitution, didn't you? A. Yes, sir; we were breaking up and I was going back home. She said she was going to stay.

"Q. You took the money that she got in that business, didn't you? A. No, sir, I took no money from her.

"Q. What became of the money that she made? A. I don't know, sir."

The report of the psychiatrist was to the effect that defendant was abnormal, that he had no sense of responsibility or the ability to differentiate, but was not definitely feeble-minded. The report of the probation officer set forth statements purporting to have been made to the officer by the defendant, and included an admission made to that officer that defendant had solicited the field of prostitution for his wife, that the girl had engaged in prostitution and that defendant received her earnings therefrom. The conclusion of that officer was that defendant was "abnormal," but that he knew right from wrong; and that public interest would be best served if probation were denied.

The court denied the motion for change of plea, saying: "Well, the Court doesn't feel that there is any reasonable question about the sanity of this defendant; if it felt that there was, he would gladly grant the motion."

Under the circumstances stated we cannot say that the trial court abused its discretion in denying defendant's motion for change of plea. In People v. Smink, 105 Cal.App. 784, 790, 288 P. 873, the court quoted from People v. Schwarz, 201 Cal. 309, 314, 257 P. 71, to the effect that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on its merits, the court may grant him the privilege of withdrawing his plea of guilty; but that such exceptional remedy applies only upon a strong and convincing showing of the deprivation of legal rights by extrinsic circumstances. Other pertinent cases are cited in the Smink case. Here there is no showing that defendant's plea of guilty was entered by reason of duress, fraud or any overreaching of his free will and judgment. He had had the benefit of advice of counsel of his own choosing and it does not appear that he had not been advised by such counsel of his legal rights and the probable consequences of the plea which he entered. He had been before a criminal court previously, and had then been granted probation, so he was not entirely unfamiliar with criminal procedure. He knew from the testimony taken at his preliminary hearing what testimony probably would be produced against him if he were granted a trial on the merits; he had made admissions of guilt; yet he made no offer to produce at a trial any evidence which would tend to prove that he was not guilty. He did not contend that his plea was induced by anything said or done by the prosecution. Though advised by the court of his right to counsel and to a delay he elected to proceed without counsel and take his chances on a favorable report by the probation officer; and the motion for change of plea was made only after that officer had filed his report and recommended that probation be denied.

The judgment appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

HUTH v. KATZ.*

Civ. 13111.

District Court of Appeal, First District, Division 2, California.

Dec. 24, 1946.

Rehearing Denied Jan. 23, 1947.

Hearing Granted Feb. 20, 1947.

1. Deeds 🔑206, 208(1)

Where the testimony of a disinterested witness that deed executed by deceased during his lifetime was delivered to plaintiff with the statement that the property then belonged to plaintiff was uncontradicted and plaintiff's testimony was to the same effect, trial court erred in finding that there was no delivery and no intention to transfer.

2. Evidence 🔑588, 594, 595
Witnesses 🔑321, 362, 397

Generally the testimony of a witness cannot be wholly disregarded and unless it is impeached or contradicted by other testimony, by some presumption, or by an inference deducible from facts proved, or unless it is inherently improbable, trial court must accept it as true.

3. Deeds 🔑56(7)

A delivery of a deed once completed is not destroyed solely by a subsequent return of the document to the grantor.

4. Deeds 🔑206, 208(2)

Positive testimony of the intent of immediate transfer and delivery of the deed was not overcome by the fact that grantor remained in possession and collected rent until time of his death.

5. Deeds 🔑56(7)

The fact that after delivery of deeds they were placed in grantor's deposit box for safe-keeping did not affect the legality of the delivery.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action to quiet title by Callie Huth, formerly Callie Wagner, against Phil C. Katz, as administrator of the estate of George Wagner, deceased. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

R. L. Husted, of San Francisco, for appellant.

Henry F. Boyen and Frank J. Fontes, both of San Francisco (Robert E. Hatch, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to real property and appeals from a judgment in favor of defendant administrator.

George Wagner, a widower aged 60 to 65 years, died intestate in San Francisco on October 7, 1943, as a result of a fall from his bed. The decedent had owned the cottage in which he resided at 1228 York Street and whatever balance remained on a $2900 note secured by a deed of trust on a similar house. When the decedent's safe deposit box was opened, the defendant administrator found a gift deed from Wagner to plaintiff of the York Street property which was dated June 29, 1943, but which had not been recorded, and an assignment to plaintiff of the note and deed of trust. Plaintiff thereupon commenced this action to quiet her title to the property.

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* Subsequent opinion 184 P.2d 521.

The evidence adduced before the trial court showed the following facts: Plaintiff, Callie Huth, was reared in the home of Wagner's brother and was regarded by the decedent as his niece. Though born a Gray she was customarily called Callie Wagner, and she called decedent "uncle." Subsequent to her marriage to Huth she visited Wagner twice a week to perform general household duties for him. The decedent, who gathered and sold junk for a living, stated to the plaintiff on many occasions that it was his desire to place all his property in her name. According to Frank R. Webb, a real estate operator and former notary public who had known Wagner for a period of twenty years, the decedent called at his office just prior to June 29, 1943, and left a former deed for purpose of description and a note and deed of trust. He requested Mr. Webb to draw a gift deed to the York Street property and an assignment of the note and deed of trust in favor of the plaintiff. At that time Wagner was in his usual health and, according to the testimony, not contemplating death. Webb advised the decedent of the legal necessity of a delivery of instruments to the donee and a member of his office staff then prepared the documents. A day or two later Wagner executed the instruments before a notary public and delivered them to Mr. Webb telling him that he would bring his "niece" to the realtor's office to accept delivery. When plaintiff and the decedent later came to Webb's office he was again informed of the necessity of a delivery to complete the transfer and Wagner took the instruments, handed them to plaintiff, and stated: "Now it is all yours." Mrs. Huth put the documents in her purse and left the office with Wagner. She subsequently placed the papers in a tin box in her home but because of a fire which occurred about three weeks later Mrs. Huth requested Wagner's permission to place them in his safe deposit box. The two went to the bank where decedent had his safe deposit box opened and plaintiff put the documents in it. Wagner had the sole means of access to the box, but told Mrs. Huth that she could have the papers at any time she desired. Subsequent to the purported transfer the decedent continued to receive the income from the property and payments on the promissory note. At the time of the trial the full amount owed under the note had been paid. Some payments were made after Wagner's death. The amount is not shown and this should be determined before judgment is entered.

The trial court found:

"At no time during his lifetime did the said George Wagner ever make, execute or deliver, either orally or in writing, any deed or assignment of any of his property to the plaintiff.

"The documents which purport to bear the signature of the said decedent and which were found in his safe deposit box, to which plaintiff had no access or control, following the death of said George Wagner, were *never delivered to or for* plaintiff and *at all times remained in the exclusive and sole possession and custody* of the decedent without any intention on his part that any title or interest in the property therein referred to should pass to plaintiff during the lifetime of said decedent." (Emphasis ours).

The testimony of Mr. Webb, which stands uncontradicted in any particular, should be given in further detail:

"Q. Did Mr. Wagner at that time or about that time sign those instruments? A. He left the papers there, the young lady prepared them, he came in shortly after, might have been the next day, I don't know, but I went with him up to the notary and he signed the papers, then he came down and he said, 'I want delivery.' He left the papers at the office, and he brought his niece in a few days afterwards, and we witnessed the delivery and signed it, and he gave the papers to her and said, 'Now it is all yours.' He had had other papers that he had signed, and we had told him that there must be delivery.

"Q. Yes. A. *He gave them to his niece.*

"Q. That is, to Callie Wagner? A. Yes. *She put them in her purse and went away with them.*

"Q. Both left together? A. Yes.

"Q. At the time these were handed to her, according to your statement he says, 'Now it is all yours,' or some words to that effect? A. Yes, he says, I remember him saying, 'Now it is all yours,' because he wanted a witness to a delivery.

"Q. What had been his condition of health, did he say anything about his condition of health? A. No, his usual condition, he was just about as usual. (Emphasis ours).

"The Court: Q. How old was he at the time, would you say? A. He was 60 or 65, something like that.

"Q. When he first came in there did he have any conversation with you in reference to transferring the property to her? What conversation did he have? A. Any more than he said he was going to give his property to his niece, that is all.

"Q. And he gave you then these papers and told you to make up the transfers, he was giving the property to his niece? A. Yes.

"Q. You had told him about the delivery of instruments? A. Yes, because we had had other papers, I think another piece of property that he received from his brother, I think that was a deed of gift we had made out, and we told him it must be a delivery."

[1] This evidence on the part of appellant stands uncontradicted and unimpeached by cross-examination. There is no presumption or inference known to the law which justifies a trial court in rejecting it. It is proof of the *fact* of delivery and intention and hence the finding of the trial court that there was no delivery and no intention to transfer has not an iota of support in the evidence. If the court could *reasonably* reject all the sworn testimony of appellant because of her interest in the litigation the testimony of Mr. Webb could not have been rejected on that ground.

The case presents the question of the power of a trial court to reject the sworn testimony of a witness and rest its judgment on findings contrary to the only evidence found in the record.

[2] On this point confusion has arisen in the decisions, not because of any divergent view on the function of the trier of facts, but because of some unsettled theories as to the status of inferences and presumptions when employed to offset positive testimony of the probative fact. Many of the cases are concerned with the question of the imputed negligence of the owner of a motor vehicle where injury occurred while some other party was operating the vehicle. Some of the cases state the rule in the negative: "Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness * * *." Hicks v. Reis, 21 Cal. 2d 654, 659, 134 P.2d 788, 790. We prefer our own statement in the earlier case of Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 349, 368, 286 P. 165, 173, 1071, reading: "The general rule is that the testimony of a witness cannot be wholly disregarded, but that unless it is impeached or contradicted by other testimony, by some presumption, or by an inference deducible from the facts proved, or unless it is inherently improbable, the trial court must accept it as true. 10 Cal.Jur. 1143; Stewart v. Silva, 192 Cal. 405, 410, concurring opinion, 221 P. 191; Sun-Maid Raisin Growers [of California] v. Papazian, 74 Cal.App. 231, 239, 240 P. 47. This rule is particularly applicable to a case such as we have here where the issue is fraud or good faith. The presumption against fraud, which approximates the presumption against crime (Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26), the presumption that private transactions have been fair and regular, and the presumption that the ordinary course of business has been followed (section 1963, subds. 1, 19 and 20, Code Civ.Proc.), are all *evidence* of good faith of the bank in this particular, and a contrary finding cannot stand without some evidence rebutting them."

This statement of the rule was quoted with approval in Pene v. Mauk, 5 Cal.App. 2d 428, 434, 42 P.2d 697, and Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114, and cited in Gomez v. Cecena, 15 Cal.2d

363, 366, 101 P.2d 477, 478, where the Supreme Court said: "While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact."

Leading the recent cases on this subject is Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868, a case involving the issue of imputed negligence of a vehicle owner. On the specific question of the function of the trier of facts the court said (20 Cal.2d at page 461, 126 P.2d at page 870): "Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. Engstrom v. Auburn Auto Sales Corporation, 11 Cal. 2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. The jury, however, is the sole judge of the credibility of the witnesses (Cal.Code Civ.Proc., § 1847; see cases cited in 27 Cal.Jur. 182, § 156) and is free to disbelieve them even though they are uncontradicted *if there is any rational ground for doing so*. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America etc. Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99. See cases collected in 27 Cal.Jur. 184, sec. 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796. In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. Bushnell v. Yoshika Tashiro, supra [115 Cal. App. 563, 2 P.2d 550]; Market Street R. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41; Day v. General Petroleum Corporation, 32 Cal.App.2d 220, 89 P.2d 718." (Emphasis ours.)

There was some difference of opinion on this statement of the rule and also on the question whether an inference was to be treated as evidence for the purpose of offsetting direct evidence. It is sufficient for us to indicate the conflict. These divergent views are ably discussed in Vol. 31, page 110, Cal.Law Review, from which we quote:

"The majority opinion also decides that though ordinarily the jury is the sole judge of the credibility of the witnesses they may only disbelieve them when there is 'rational grounds for doing so'; that a jury is not at liberty to disbelieve witnesses whose testimony is positive, probable and uncontradicted who are not impeached. The minority concludes that the jury is the sole judge of the credibility of the witnesses and may disbelieve them although the testimony they give is probable, positive, and uncontradicted and they are not impeached; that the demeanor of the witness and his manner of testifying may always justify rejection of oral testimony.

"Both propositions asserted by the minority are unsound. One runs counter to fundamental principles of logic, the other, although not illogical, lacks the support of the great weight of judicial authority. A jury is not free in Anglo-American law to disbelieve all oral testimony, nor is an inference evidence. In California as in most jurisdictions the courts clearly hold that a verdict may be directed for the plaintiff who has the burden of proof where the oral evidence is clear, positive and uncontradicted and the witnesses are unimpeached. These decisions refute, completely, the proposition that a jury may disbelieve all oral testimony of witnesses because they are not impressed by their demeanor or manner of testifying. Our trial by a judge and a jury is not and never has been one which sanctions arbitrary action by the fact finding lay group which forms a part of the tribunal. They may disbelieve witnesses for good reason but are not at liberty to act capriciously. To permit a jury to disbelieve witnesses under any circumstances would eventually bring trial by jury into disrepute."

We do not need to continue the legalistic discussion as to the probative effect of an inference further than to cite the language of the dissenting opinion in Hicks v. Reis, 21 Cal.2d 654, 665, 134 P.2d 788, 793, reading: " 'Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60.' This language makes it clear that an inference from the facts proved must be a reasonable one. The essence of an inference is its reasonableness, as this court recognized when it denied a hearing in Maupin v. Solomon, 41 Cal.App. 323, 326, 183 P. 198, 199, declaring: 'When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts.' See, also, Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Grand Lodge A. O. U. W. [of Washington] v. Miller, 8 Cal.App. 25, 96 P. 22."

[3] Here there is no presumption that the witness Webb testified falsely. The presumption is to the contrary. There is no basis for an inference that the documents were not executed and delivered in the manner stated. Though the rule that the testimony of a party interested in the outcome of litigation may be viewed with suspicion might apply to the testimony of the appellant if the trial court entertained any suspicion as to her honesty, no such rule is applicable to the testimony of Mr. Webb. The only attack upon his testimony made by the respondent herein is that his transactions amounted to the practice of law for which he was not legally qualified, though it was shown that he received no compensation for his services. Suspicion was thereby cast upon his testimony that because he had done wrong in one instance he must have committed perjury when he was called as a witness in this proceeding. If the law recognizes any such inference, no authorities have been cited in support of it and we have found none. We may assume that the attack is made to add color where reason and logic fail. It is significant that his testimony regarding the delivery of the documents to appellant was corroborated by the physical fact that, after the documents had been delivered to her, certain writings were added to the back of the assignment on the request of Mr. Wagner. These notations were in the handwriting of appellant. It is not necessary to cite authorities to the point that a delivery once completed is not destroyed solely by a subsequent return of the document to the grantor.

[4, 5] It is possible that the court entertained the belief that the fact that the grantor remained in possession of the home and collected rent for one of the rooms was sufficient to overcome positive evidence of the intent of immediate transfer and of the delivery of the instrument. That this theory is unsound see Stewart v. Silva, 192 Cal. 405, 410, 221 P. 191; Shaver v. Canfield, 21 Cal.App.2d 734, 738, 70 P.2d 507, and cases there cited. The fact that after the delivery of the deeds they were placed in the grantor's safe deposit box for safe-keeping does not affect the legality of the delivery, Shaver v. Canfield, supra; Longley v. Brooks, 13 Cal.2d 754, 761, 92 P.2d 394. Of course if there had been no evidence of delivery at the time of the execution of the documents their presence in the safe deposit box of the grantor would create a presumption of ownership in him through possession. But with the direct and positive evidence of delivery standing undisputed, the presumptions that private transactions have been fair and regular, and that the ordinary course of business has been followed, fully corroborate the testimony of the appellant that these documents had been placed in her uncle's safe deposit box at her request for safe-keeping. No inferences arise from these transactions tending to dispute the positive evidence of delivery.

The judgment is reversed with directions to amend the findings as indicated, to determine the amount due appellant under the deed of trust, and to enter judgment for the appellant.

GOODELL and DOOLING, JJ., concur.

ZANETTI v. ZANETTI.

Civ. 13270.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1947.

Rehearing Denied **Feb. 7, 1947.**

Hearing Denied **March 6, 1947.**

1. Partnership 🔑67

A partnership may own a patent issued in the name of an individual partner. Civ. Code, § 2402(1, 2), 35 U.S.C.A. § 47.

2. Partnership 🔑67

The chief criterion for determining whether property belongs to the partnership is the intent of the partners to devote it to partnership purposes. Civ.Code, § 2402 (1, 2).

3. Partnership 🔑67

Evidence sustained finding that patents, though issued to individual partner, belonged to the partnership. Civ.Code, § 2402 (1, 2).

4. Patents 🔑197

The statute providing that patents are assignable in law by instrument in writing does not mean that patentee must in every case execute the assignment by his own hand. 35 U.S.C.A. § 47.

5. Partnership 🔑340

In proceeding for dissolution of partnership, court had jurisdiction to order a partner to execute a transfer of patents belonging to partnership but standing in individual partner's name to purchaser at receiver's sale and to order that if patentee failed to make proper assignment, assignment executed by receiver would pass title to purchaser. 35 U.S.C.A. § 47.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Andrew D. Zanetti against Joseph Zanetti for dissolution of a partnership, accounting and appointment of a receiver wherein defendant filed a cross-complaint seeking similar relief and claiming ownership of two patents as his separate property. From a judgment in favor of plaintiff, defendant appeals.

Judgment modified and as modified affirmed.

Henry Gifford Hardy, of San Francisco, for appellant.

Joseph A. Garry, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Respondent commenced an action against appellant alleging an oral partnership between the parties in the printing and basket making business and grounds for the dissolution of the partnership. The complaint set forth that certain property, including certain patents, belonged to the partnership and prayed for the dissolution of the partnership, an accounting and the appointment of a receiver. Appellant filed an answer and also filed a cross-complaint in which he likewise sought the dissolution of the partnership and the appointment of a receiver. Appellant set forth in his answer and cross-complaint that certain patents in connection with basket making machinery were his separate property and not the property of the partnership. A receiver was appointed pendente lite.

Upon the trial the nature and extent of the partnership assets, with the exception of the patents, were settled by a stipulation of the parties, approved by the court, and filed in the action. The entire trial was upon the issue as to whether the partnership assets included "United States letters patent for vacuum paper feeders, No. 1825765, granted October 6, 1931 to Joseph Zanetti" and "United States letters patent for machines for making paper boxes, granted to Joseph Zanetti, July 3, 1934 and numbered 1965274." These patents were claimed by appellant as his separate property. Upon this issue the court found against appellant's averments that he was the owner of the patents and expressly found that the assets of the partnership included the two patents hereinbefore described. This appeal is from the judgment entered in accordance with said findings and decreeing that all assets of the partnership be sold by the receiver and the net proceeds be divided between the partners equally.

Appellant contends that the finding that the two patents were partnership assets lacks evidentiary support, and that the judgment should be modified to provide that said patents are the individual personal property of appellant.

The following oral summary of evidence by the trial court is amply supported by the record: "I am prepared to find, if there is any question about it, that the partnership was orally created away back in 1920, not in 1923, but 1920, between these parties, which has continued up to the present time. * * * We are dealing with two brothers, and I do not have to repeat, two congenial brothers who, by their mutual efforts and endeavors have built up a successful business out there in what I think we call the Bay View Section of San Francisco. Now, one of them perfected himself in the craft of being a machinist. The other became a printer, and I daresay from his description of the kind of work he has been doing, a very good one, and in addition to being a printer, the record this morning shows that for three years he discarded his printing vocation and, along with his brother who is a machinist and I imagine a very good one, although he never received a college education, but he gained his knowledge of his craft in a better school, the school of experience,—for three years Andrew the printer discarded his printing vocation and worked with his brother in the machine shop which they conducted as a partnership enterprise. In 1923 they enlarged, for the mutual benefit, in order to increase their income, they introduced into the same building, into the same plant where they had previously conducted a machine shop alone, the printing establishment. Naturally by reason of the skill or knowledge of each one of them in their particular lines Andrew conducted the printing establishment while his brother conducted the machine end of the business. They went on from 1923 until the present time, that is a matter of twenty-two years, successfully and profitably. During the course of their satisfactory and profitable career as partners, they developed various patents which have been introduced in evidence here. By patents I mean the letters patent emanating from the Patent Office of the Department of Commerce. Some of those patents, or at least one of them, related to betterment of the printing establishment, improvements in the method of conducting the printing shop. Others related to improvements in turning out berry baskets, which seems to have developed in these later war years into the more profitable end of the business. I have no information, and it does not concern us, whether or not in the previous years the printing end of the business produced less or more profit than the machine end of the business, because during those years even up to the present time, these two brothers, under a favorable understanding which you would expect in a case of this kind, have shared the expenses and divided the profits of the business or businesses conducted in the same building, in the same establishment, by both of them. One of the patents was taken, although Andrew claims that he, through his skill developed the patent, was taken in the name of both of them. The more important patent which is the subject of the present controversy was taken out in the sole name, in the individual name of Joe. Now, by reason of the close and friendly fraternal relationship that existed between these parties for so many years, by reason of the fact that they pooled all their knowledge as to their respective trades and crafts, by reason of the fact that during all these years they have conducted both businesses, the printing business as well as the machine-shop business in the same premises, by reason of the fact that during this great length of time, they have been in fact partners in every sense of the word, regardless of the absence of a formal written agreement between them, and during that entire time they have shared their expenses as partners and profits as well, which in and of itself indicates the existence of a partnership, I am prepared to make a finding in consonance with all the evidence and the implications derived therefrom, the inferences following from the evidence, that this particular patent, the subject of controversy here, belongs to the partnership, that both of the parties have an equal interest in this particular patent, regardless of the fact that it was taken out in the name of Joe as an individual and not in the partnership name. That is my judgment and will be my judgment incorporated in proper findings, as to the ownership of the patent."

It is not disputed by appellant that all of the expenses in connection with the development and obtaining of the patents in controversy were paid out of the common partnership account; that three of the suction feeder machines were made under the patent, one being used in the partnership business and two being sold for $1,000 each and the proceeds divided equally between the partners; and that appellant had neither claimed nor expected compensation from the partnership for the use of the patent. Appellant contends that he alone designed, made and invented the said patented machines, but there is ample evidence to support the implied finding of the court that respondent contributed ideas and suggested changes and improvements which were incorporated in the inventions. In fact the most reasonable inference to be drawn from the evidence is that while appellant did construct the model of the machines in the machine end of the business, which he had charge of, respondent also had a substantial part in perfecting and completing it.

Appellant argues that under the United States Patent law the patents in controversy would have been invalid if respondent were in fact the co-inventor and he quotes the following language from the case of Wailes Dove-Hermiston Corporation v. Oklahoma Contracting Co., D.C., 48 F.2d 901, at page 902: "A patent is invalid when not granted to the original and first inventor, and, if two invent, the sworn application by one of such two will not satisfy the statute. To allow one of two inventors to attempt to satisfy the precise statutory requisite would be to set aside such requisite, and to allow one, who in truth was not the inventor, to reap the monopoly afforded. [Citing cases.]"

Appellant argues further that by finding and decreeing that the said patents were partnership assets the court impliedly found that respondent was not a joint inventor of the machines covered by the said patents. Appellant points out that the trial court made no finding that appellant had assigned or agreed to assign any interest in the said patents to respondent and that there is no evidence of any such assignment or of any agreement, written or oral, concerning these two patents. Appellant then asserts the mere partnership relation between appellant and respondent would not create any presumption that respondent acquired an interest in the patents, legal or equitable, and in support of this contention appellant quotes from Burr v. De La Vergne, 102 N.Y. 415, 7 N.E. 366 at page 367: "The proposition asserted in behalf of the defendant, that one partner acquires no right or interest, legal or equitable, in an invention made by his copartner during the existence of the partnership, by reason merely of the copartnership relation, although the invention relates to an improvement in the machinery to facilitate the business carried on by the firm, and although the partner making the invention uses copartnership means in his experiments, and is also bound, by the copartnership articles, to devote his whole time and attention to the firm business, is a doctrine supported by authority and consonant with reason." Appellant then concludes his argument upon this phase of the case by stating that as sole inventor appellant has always had and still has the sole title to said patents, that these patents are his individual property, and that contrary to law and the facts, the judgment takes appellant's individual property and orders it sold as partnership property.

[1] Appellant's argument is ingenious but far from convincing. The mere fact that the said patents were applied for and issued in the name of appellant would not prevent them from being partnership property under the evidence in this case. There is no legal impediment to the owning by a partnership of a patent issued in the name of an individual partner.

In 40 Am.Jur. p. 203, sec. 108, it is stated: "* * * a partnership may own a patent right, since it is incorporeal personal property, and it makes no difference in whose name letters patent may be taken out."

And in 35 U.S.C.A § 47, it is stated in note 11: "Patent rights may be held in partnership, the mutual rights and liabilities of the parties being determined by their agreement and by the general partnership law." [Citing a long list of cases.]

In the early case of Davis Imp. Wrought Iron W. W. Co. v. Davis Wrought Iron W. Co., C.C., 20 F. 699, it was held that the legal title to a patent may be in one person and the equitable title in another.

In Somerby v. Buntin, 118 Mass. 279, 19 Am.Rep. 459, in which case the patent was obtained in the name of one partner, the court said: "The patent, when obtained, was therefore not the result of the efforts, the service or the money of one partner, but of the joint contribution of all, and was in equity partnership property, in whosoever name letters patent were taken out."

In Hill v. Miller, 78 Cal. 149, 20 P. 304, it is said: "The patent was obtained for the hay-press while the copartnership was in existence, and while the plaintiff and defendant as copartners were manufacturing the hay-presses. We think the court properly held that the patent so issued under an agreement that the hay-press should go into the partnership as part of its stock belonged to the partnership.

'It is a matter of no consequence that there was no written assignment of a half interest in the patent by defendant to plaintiff. The plaintiff, as a partner, become in equity the owner of one half of the patent, though the agreement was by parol."

Section 2402 of our Civil Code provides: "(1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property. (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property."

[2] In 40 Am.Jur. sec. 89, page 191, it is stated: "* * * the chief criterion for determining whether certain property is or is not that of the firm is the intent of the partners to devote it to partnership purposes. * * * Under the provisions of the Uniform Partnership Act, all property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property, and unless the contrary intention appears, property acquired with partnership funds is partnership property."

[3] In view of the foregoing authorities and of the facts and circumstances of this case, as shown by the record, there can be no doubt that the conclusion of the trial court that the two patents in controversy were property of the partnership is abundantly supported by the law and the evidence. A reading of the record makes it easy to understand why the trial judge decided the case from the bench immediately upon the conclusion of the testimony.

[4, 5] Appellant's final contention is that the judgment orders all of the partnership assets, including the two said patents, to be sold by the receiver, and that the patents being in the name of appellant, they may not be sold by the receiver. This is a mere matter of the proper procedure to carry out the determination of the trial court that the patents were partnership property and should be sold by the receiver along with other partnership assets. In Cookson v. Louis Marx & Co., D.C., 23 F.Supp. 615, at page 617, the court said: "The patent act provides that patents are assignable in law by instrument in writing. 35 U.S.C.A. § 47, Revised Statutes, § 4898. This does not mean that the patentee must in every case execute the assignment by his own hand. On creditor's bill a court of equity may appoint a trustee to make an assignment of a debtor's patent right in case the debtor himself does not make the required assignment, and an assignment executed by the trustee will pass title to a purchaser. Ager v. Murray, 105 U.S. 126, 26 L.Ed. 942; Wilson v. Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 515, 24 N.E. 784, 8 L.R.A. 309." It is clear from the authorities that the trial court has the power to order the appellant to execute a transfer to the purchaser at the receiver's sale and to order that if appellant fails to make the proper assignment that an assignment executed

by the receiver will pass title to the purchaser. The findings, conclusions and judgment are therefore modified to so provide. As so modified the judgment is affirmed, respondent to recover costs on appeal.

PETERS, P. J., and WARD, J., concur.

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77 Cal.App.2d 411

DODDS v. STELLAR.

Civ. 15220.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1946.

Rehearing Denied Jan. 9, 1947.

1. Physicians and surgeons 🔑18(9)

In action for injuries to plaintiff resulting from physician's negligent use of fluoroscope in examining plaintiff's hand, whether injuries sustained resulted from a radiation burn and not from trauma or other influences, and whether sole and efficient cause of injuries was physician's negligence, were for jury.

2. Physicians and surgeons 🔑18(8)

In malpractice action against physician, his negligence need not be demonstrated conclusively, but preponderance of evidence only is required, and fact finders may with reasonable limitations draw their own inferences from proven facts and may reject alternative opinions while accepting primary opinions of experts.

3. Appeal and error 🔑1001(1)

Where verdict of jury is supported by any substantial evidence tending to establish correctness of facts determined, appellate court cannot reverse judgment for insufficiency of the proof.

4. Physicians and surgeons 🔑18(8)

Testimony of four experts that, in view of history given, wound was caused by radium or X-ray radiation, was more than a scintilla of evidence and constituted substantial proof in action for injuries resulting from physician's negligent use of fluoroscope in examining plaintiff's hand.

5. Evidence 🔑591, 595

Where there is conflict between witnesses presented by party or any inconsistency between his living witnesses and his documents, or between inferences drawn from facts proved by either, jury may choose writing of the witness or inference upon which they will base their finding.

6. Physicians and surgeons 🔑18(8)

In action against physician for injuries resulting from negligent use of fluoroscope in examining plaintiff's hand, jury could ignore medical book and base finding regarding development of plaintiff's trophic ulcer upon testimony of plaintiff as to date of his exposure and his subsequent experience and upon uniform opinions of experts that tissue of ulcer was result of X-ray burn or was consistent with such burn.

7. Damages 🔑208(7)

In action for injuries resulting from physician's negligent use of fluoroscope in examining plaintiff's hand, whether plaintiff used due diligence in determining not to undergo an operation or incision when first suggested so as to warrant recovery of special damages was for jury.

8. Damages 🔑208(7)

In determining whether patient was entitled to special damages for injuries caused by physician's negligent use of fluoroscope in examining patient's hand resulting in ultimate amputation of finger, jury in weighing reasonableness of patient's refusal to undergo an operation could consider factors involved in patient's case and the uncertainty of medical opinion as frequently demonstrated.

9. Damages 🔑62(2)

If patient exercised reasonable diligence in caring for his injury and used reasonable means to prevent its aggravation, patient was not obligated to undergo amputation of finger promptly when advised by his physician to do so solely because it might, by accomplishing speedy healing of the wound, minimize the loss to be suffered by physician whose negligence had caused the injury.

10. Damages ⚿62(2)

Where benefits to be gained by refusal of person who has been injured through negligence of another to undergo a serious operation are doubtful, such refusal may be reasonable notwithstanding such operation be advised by competent physician, and person cannot be compelled to submit to operation which would necessarily require loss of hand or finger, especially where benefit to be derived from operation is problematical, and where therapeutic drugs have not been tried.

11. Physicians and surgeons ⚿18(11)

$10,000 general damages and $4,942.05 special damages to plaintiff, who suffered amputation of finger following ulcer resulting from radiation or X-ray burn, were not excessive in view of pain and losses suffered and of currently deflated value of the dollar.

12. Appeal and error ⚿1004(1)

The power of the appellate court over excessive damages is invoked only when facts are such that the excess appears as matter of law or is such as to suggest, at first blush, passion, prejudice, or corruption.

13. Appeal and error ⚿1004(3)

When trial court has refused to set aside verdict on ground that it is excessive, verdict must stand unless it greatly exceeds the reasonable sum that might be fixed by enlightened men of sober judgment as reasonable compensation for injury suffered by plaintiff in his situation at time of, and after the injury, and if verdict approved by trial court does not shock sense of justice and immediately induce a belief that award was prompted by prejudice, passion or corruption, appellate court should not disturb the judgment.

14. Trial ⚿296(8)

Where matter omitted from formula instruction has been fully, fairly and correctly covered by court's charge and it is obvious that jury was not misdirected, omission of substantial factor is not prejudicial.

15. Trial ⚿296(3)

In action against physician for negligent use of fluoroscope in examining plaintiff's hand resulting in amputation of finger, instruction was not erroneous as overlooking defense of contributory negligence arising from plaintiff's neglect to quit work and have his hand treated, where court in essence covered such defense by other instructions.

16. Trial ⚿295(1)

The merits of instruction cannot be appraised by lifting it for analysis from court's entire charge.

17. Appeal and error ⚿1066

An instruction on measure of credibility and discrepancies in witness' testimony, that "failure of recollection is a common experience and innocent misrecollection is not uncommon" presented a truism and hence was harmless notwithstanding quoted language might be regarded as a gratuitous observation.

18. Appeal and error ⚿1064(1)

While customary form of telling jury that they were the "exclusive judges of all questions of fact" was not used, no prejudice resulted from slight deviation in language of admonition, which left no doubt of court's meaning that jury were exclusively to judge the facts in evidence.

19. Appeal and error ⚿928(4)

Where allegedly erroneous instruction was not shown to have been requested by respondent, it would be presumed to have been suggested by appellant, and hence could not constitute cause for reversal.

20. Trial ⚿234(8)

Instruction, directing jury to consider all the evidence before determining whether plaintiff received a third-degree burn and whether trophic ulcer was caused by burn or by trauma, while plaintiff worked at shipyards, was not erroneous in instructing jury to reject weaker evidence offered by party if jury should find it was within power of party to produce stronger evidence.

21. Trial ⟹296(11)

An instruction, in malpractice action against physician, that in arriving at amount of award jury should determine each item of claimed detriment provided jury should find such items to have been suffered by plaintiff as proximate result of sustaining of X-ray burn, was not erroneous for failure to caution jury not to include entire cost of services of physicians, and entire value of time lost, in total sum which would compensate for disfigurement, pain, discomfort, and anxiety, past and present, where court's charge defined the two kinds of damages and specified the items constituting each.

22. Damages ⟹214

An instruction, in malpractice action against physician, that in arriving at amount of award jury should determine each item of claimed detriment provided jury should find item to have been suffered by plaintiff as "a" proximate result of sustaining of X-ray burn was not erroneous for use of "a" instead of "the" as having effect of relieving plaintiff of his share in causing his losses by aggravating the burn, where there was no contributory negligence pleaded or urged as cause for burn but reliance was placed upon failure of plaintiff to avoid aggravating the injury, and jury was properly instructed as to that phase of case.

23. Appeal and error ⟹930(2)

Jury is presumed to have understood instruction and to have acted upon it.

24. Trial ⟹229, 240

Repetitious and argumentative instructions were properly refused.

25. Appeal and error ⟹1067

Where defendant requested court to read 26 instructions from a textbook, trial court properly incorporated such of the 26 as court deemed necessary, and that some of those rejected might have been as desirable as those selected did not constitute prejudice.

26. Trial ⟹237(5)

An instruction that jury need not decide in conformity with testimony of a number of witnesses which does not produce conviction was proper.

27. Trial ⟹260(1)

A requested instruction covered by court's charge was properly refused.

28. Appeal and error ⟹1170(9)

Where, upon examination of entire cause including evidence, appellate court was persuaded that no instruction given or refused resulted in miscarriage of justice, judgment could not be reversed. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold P. Dodds against Robert Woodley Stellar to recover for injuries resulting from defendant's negligent use of a fluoroscope in examining plaintiff's hand. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Hahn & Ross and Phillip W. Silver, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent sued for damages alleged to have resulted from injuries suffered from appellant's negligent use of a fluoroscope in examining respondent's hand. Following a verdict against appellant for $10,000 general damages and $4,942.05 special damages, judgment was entered for the aggregate of the two sums and for costs. On this appeal reversal is demanded on the grounds of (1) insufficiency of the evidence to support a judgment for any sum, (2) insufficiency of the evidence to support the implied finding that respondent's total damage was the proximate result of an X-ray burn sustained by reason of the negligence of appellant, and (3) prejudicial errors in the giving and in the refusal of instructions.

Proof of General Damage.

In the latter part of October, 1941, respondent while at work for the California Shipbuilding Corporation suffered a bruise and laceration between the distal and medial phalanges of his middle, left finger about the size of a dime when a steel beam fell upon it. He reported at once to the first-aid hospital where under the direction of Doctor Waterman, an employee of appellant, he extended the injured member for ten minutes into the radiation of the X-rays applied in conjunction with a fluoroscope while the physician examined the injury. He then soaked it in a solution of epsom salts after which it was dressed with ointment and bandaged. He returned at intervals of two or three days for three weeks for the treatments while he continued at his work. Although he favored the finger it did not cause him any distress. After the sixth treatment the injury healed. About four days later it broke open, making a wound about half an inch in length. Thereafter it habitually healed in approximately a week and broke open again in four days. This continued for almost seven months, during which time respondent did not report this capricious behavior to anyone in the hospital. He returned to the emergency hospital on July 3, 1942, when a callus had formed over the wound, and an X-ray was made of the injured area. He then obtained from the hospital a piece of adhesive tape and wrapped it around the sore spot. It remained for four or five days during which he felt a burning, irritating pain which had first occurred about a month prior to the formation of the callus. On removing the tape the callus came off. He then returned to the hospital where he was referred to appellant. He discontinued work July 15. After an examination by an associate of Doctor Stellar at the latter's office respondent was examined next on August 14, 1942, by Doctor Foster, a specialist in dermatology. At that time the doctor found "on the anterior surface of the finger" an arthrempyesis[1] about a half inch in diameter with a small ulcer in the center. The posterior surface was smooth and red. Basing his opinion upon such examination and upon the history given by the patient, Doctor Foster testified that his diagnosis was "X-ray ulcer with dermatitis" which means an ulcer produced by radiation of radium or X-ray with the surrounding area inflamed. The only variation of the history as given at the time of the examination to Doctor Foster from that proved at the trial is that respondent there for the first time admitted that he had returned to the field hospital on July 3 for further examination instead of in March as stated to Doctor Foster.

On August 31, 1942, respondent was examined by Doctor Meland to whom he stated substantially the same history as that given to Doctor Foster except that the month of removing the adhesive and exposing the ulcer was May instead of March. He complained to Doctor Meland of pain in his arm as well as in the ulcer. The diagnosis was "trophic ulcer, consistent with roentgen dermatitis," meaning an "ulcer that has no tendency to heal, that appears secondary to a large dose of radiation usually administered through the X-ray tube." The doctor saw him twice in September and twice in October and administered medicaments: pantocain and sulpha drugs to the wound, leaves of cactus plant, radon ointment, lanolin and vaseline. He finally recommended excision of the ulcer which was performed by others at the hospital on October 9, 1942. This operation did not clear up the infection which was in the wound on August 31. He testified that the pain caused by an X-ray burn is of a burning type with occasional stabbing sensations. The excision was down to the tendon. There was then a possibility of doing a graft but the infection could not be cleared up. The patient suffered a red rash with water blisters as a result of his allergic reaction to the sulpha drugs and continued to have pain which could be relieved only by codein. Doctor Meland recommended amputation of the entire finger to which respondent acquiesced and the operation was performed December 1, 1942. The swelling progressed up his arm and the increased temperature and redness of the skin necessitated the opening of the wound on December 17. The wound healed slowly. Respondent was discharged from the hospital February 10, 1943.

The injured man was examined October 7, 1942, by Doctor Shelton at the California Hospital. The case history as given to him by the patient was as follows: "I went to the First-Aid Emergency Hospital on Terminal Island where a fluoroscopic examination was made. No fracture was reported. There was a cut on the finger which healed but left quite a thick callus-like area which continued to be painful. I went back to work, but the same continued and X-rays were made. The callus and skin broke down, drained, and did not heal afterwards." Basing his opinion upon his examination and the history Doctor Shelton testified that it was a "trophic ulceration with dermatitis * * * consistent with an X-ray burn. * * * There was some fibrosis changes in the tissue such as accompany trophic ulceration and circulation was impaired in that area * * * I thought amputation would probably be necessary * * * but in view of the patient's objection I thought we would try the next best thing * * * to remove the ulcer and scar * * * with the idea of putting a graft of skin * * * in the defect after the effects had healed." With Doctor Meland's concurrence Doctor Shelton excised the ulcerated area down to the level of the tendon sheath for the purpose of grafting over the area. They had little hope of success but gave respondent the benefit of such procedure, since he perferred not to have an amputation. He discovered "changes in the tissue such as accompany trophic ulceration. * * * My opinion was that if the finding which we noted could be due to X-ray, if there was a definite X-ray exposure it would account for the condition. The wound had a persistent septic, low-grade bacterial infection. It is possible for a chronic ulcer to develop with repeated trauma to an infected wound."

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[1] Arthrempyesis: Suppuration in a joint.

Doctor Wright, a specialist in pathology, made a microscopic examination of the tissue taken from respondent's ulcer. This showed such changes as characterize prolonged X-ray radiation. On December 1, 1942, he examined the amputated finger which also revealed changes caused by an X-ray burn and observed that there are no causes for such changes other than radium or X-ray radiation.

The responsibility of appellant for any injury to respondent proved to have resulted from the fluoroscopic examination on October 30, 1941, was admitted by appellant at the trial and was established by the testimony of his assistant, Doctor Waterman.

[1-3] From the foregoing resume of portions of the testimony of the four expert witnesses no doubt can obtain that the jury had ample competent proof that the injuries suffered by respondent were the result of a radiation burn. Discrepancies in the testimony, contradictory statements by respondent and possibilities that the ulcer might have been caused by trauma or other influences were resolved by the jury in deriving the ultimate fact of respondent's X-ray burn. In such cases it is not necessary to demonstrate conclusively the negligence of the physician. Barham v. Widing, 210 Cal. 206, 215, 291 P. 173; Mirich v. Balsinger, 53 Cal.App.2d 103, 113, 127 P.2d 639. A preponderance of the evidence only is required, and the fact finders may within reasonable limitations draw their own inferences from proven facts; also, they may reject alternative opinions while accepting the primary opinions of experts. Bedford v. Pacific Structural Welding Corp., 121 Cal.App. 162, 163, 8 P.2d 558. Where the verdict of a jury is supported by any substantial evidence tending to establish the correctness of the facts determined the appellate court is powerless to reverse the judgment for insufficiency of the proof. Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 25 P.2d 429.

Respondent's testimony that his finger was held under the influence of X-rays while being examined through a fluoroscope October 30, 1941; his immediate suffering with intense pain until December, 1942; the excision of the ulcer; the amputation of the finger; the pus-draining operation; the pain in his arm; confinement to the hospital; loss of power in his hand; his worry and anxiety—all warrant the finding that the sole and efficient cause of his injuries was the negligence of the physician who exposed his hand to the radiation, and that his general damage was reasonably the sum of $10,000.

Appellant complains that the diagnoses of Doctors Meland and Shelton were based upon false conditions. He asserts that the callus did not exfoliate and the ulcer appear in May but in August, 1942, as was proved at the trial; that respondent testified that he continued working and did not quit work as he had told Doctor Meland. The jury may have found that Dodds' memory was confused for he told Doctor Shelton that he "went back to work but the same (the wound) *continued* to be painful."

The argument that there is no proof that respondent received an X-ray burn was what appellant's counsel must have vainly argued to the jury. The contention that the operation of the X-ray machine with the X-ray tube below respondent's hand does not prove the presence of the energy, the *amount* of the voltage or amperage, or that respondent sustained a burn on October 30, 1941, comes with little force in the face of the jury's finding that the burn was received at the time and place and as testified by respondent.

[4] The jury had the benefit of all discrepancies between respondent's testimony and his prior statements to the physicians. It is not material now that no witness testified to the number of Roentgen units to which the hand was exposed. It suffered a burn as a result of the October exposure, a trophic ulcer formed and respondent suffered. These are the facts which are established by the testimony. That the ulcer might have been caused by respondent's continuing to labor between November 1, 1941, and July 15, 1942, with his hand in a glove was a possibility rejected by the jury and by the trial court in denying a new trial. They chose to find that while the injured hand was exposed to an X-ray tube, with the machine running, the hand was burned; and four experts testified that in view of the history given the wound was caused by either radium or X-ray radiation. This is more than a scintilla of evidence. It is substantial proof.

[5] Appellant invokes the rule that a party is bound by the recitals of documentary evidence introduced by him. Davenport v. Stratton, 24 Cal.2d 232, 240, 149 P.2d 4; 20 Am.Jur. 771, sec. 915. He then proceeds to demonstrate that certain statements in the work "X-Rays and Radium in the Treatment of the Skin," by McKee, introduced in evidence by respondent, are inconsistent with the diagnoses of the witnesses. The elaborate argument to illustrate the hopelessness of respondent's position by showing the inconsistencies between McKee's discussion of the symptoms of a third degree X-ray burn and the medical testimony is interesting but not convincing. It was the privilege if not the duty of respondent's counsel to offer in evidence the entire McKee volume at the time of reading any part of it. Conceding, arguendo, that it contains language contradictory of the expert witnesses, it is a rule governing appeals that where there is a conflict between the witnesses presented by a party or any inconsistency between his living witnesses and his documents, or between inferences drawn from the facts proved by either, the jury are at liberty to choose the writing or the witness or the inference upon which they will base their finding.

[6] Appellant contends that it is impossible for the trophic ulcer to have been caused by the fluoroscope incident because the period of time between the exposure October 30, 1941, and the appearance of the ulcer in July of 1942 is too great. This contention is based upon McKee's opinion that the symptoms of a third-degree X-ray burn are as follows: "The patient usually feels a great deal of heat, feels quite hot within the next two or three days, sometimes the first night afterwards, and then redness of the skin is noted and the condition becomes worse. Finally the skin begins to peel off on the surface and the glands are destroyed; that is, they atrophy and the hair disappears and the skin becomes thin and eventually ulcerates." Nothing contained in the foregoing quotation is inconsistent with the development of respondent's trophic ulcer or with the language of the experts who testified that the symptoms indicate an X-ray burn. But if there were a contradiction the jury were privileged to ignore McKee and to base their finding upon the

testimony of respondent as to the date of his exposure and his subsequent experience and upon the uniform opinions of the experts that the tissue of the ulcer was the result of an X-ray burn or was consistent with such a burn.

Respondent's Injury the Sole Proximate Result of the X-Ray Burn.

Respondent was first examined by Doctor Foster on August 14, 1942, and by Doctor Meland 17 days later. At the first visit Doctor Meland "discussed the advisability of an amputation of the finger * * * and told Mr. Dodds * * * that if the ulcer remained in the same condition the probable treatment would be amputation * * * that in my opinion * * * these palliative measures * * * would do absolutely no good excepting to relieve pain * * * that best treatment and the most certain way, and practically the only certain way of getting rid of pain * * * was to amputate the finger at once. * * * When I told him that he should submit to an amputation he told me, in substance, that he would rather let the thing go, and take a chance on whether there might be some improvement in the ulcer * * * at the time I first saw him I recommended the amputation of the entire finger to be sure that enough was taken off to eliminate any possibility of any further trouble from the X-ray burn itself." Subsequent events narrated by Doctor Meland follow: September 14, 1942, respondent entered the hospital where drugs were for a time used without conquering the pain. These abortive attempts were followed by the excision. It was then found that while he had good blood supply and free bleeding, the ulcer had been infected before the operation. The application of sulfa drugs was tried but abandoned because of the allergic reaction, and the finger was amputated December 1, 1942. Thereafter the healing was slow; swelling appeared along the suture line and up the arm with redness of skin and a temperature. On January 7, 1943, Doctor Shelton joined Doctor Meland in advising respondent that an incision should be made in order to effect better drainage but the patient refused to submit to the operation then or at any time prior to his leaving the hospital. He was planning on going to a nationally known clinic. Almost daily the doctor observed the pain suffered and the slowness of the healing until respondent was discharged from the hospital February 10, 1943. On February 24 and March 26 he still suffered pain and there was thickening of the soft tissue on the latter date. An incision was made to effect better drainage to clear all infection. On May 20 a small callus had developed in the palm of his right hand, the precise cause of which was not determined. On June 15, 1943, there was tenderness over the stump where the skin adhered to the wound. The same condition appeared to obtain on December 29, 1943. On May 31, 1944, a neuroma[2] involved the scar. Such condition produced shooting pain on touch and at times without contact. March 13, 1945, the scar was still tender and pain was present in the two fingers adjacent to the stump and in the arm. The surgery performed by Doctor Shelton was good. On March 26, 1943, he submitted to the incision to improve the drainage, remove the infection and relieve the pain.

[7] Whether respondent used due diligence in determining not to undergo the amputation or the incision when first suggested and acted as a prudent person should have acted under the circumstances was a question for the jury. (45 C.J. 1311.) From the testimony it is seen that respondent followed the advice of his physicians in all respects except two: (1) Delaying to have the amputation on September 1, 1942, and (2) to have the incision on January 7, 1943. Unquestionably the jury must have considered whether the attitude of respondent was one of refusal to follow the advice of his physicians or was, because of his extended experience, one of justifiable fear of want of their skill. Whether such delays under the circumstances were those of a reasonably prudent person determines the right of respondent to recover all of the special damages, and

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[2] A small amount of scar tissue that collects at the end of a nerve that has been cut off and at times lies free in the tissues and at other times lies in the scar itself.

the implied finding was that respondent was not arbitrary in not promptly acceding to each suggestion of an operation.

The jury were evidently influenced by the following facts: (1) The physicians agreed about September 1, 1942, to use drugs that they might destroy the infection and remove the foul tissue. After two weeks of medicaments they advised excision of the ulcer. (2) They performed that operation September 14. They were encouraged then to believe that because of the free bleeding a grafting of new skin over the scar might be accomplished. (3) At no time during September, October or November, 1942, did either Doctor Shelton or Doctor Meland decline to treat respondent unless he would have the finger amputated. (4) At the first suggestion of amputation, September 1, 1942, no serious attempt had been made to treat the wound with drugs, which is the universal custom of dealing with chronic sores. (5) It was not an unreasonable preference to choose to keep the injured organ and in acceding to his wishes for two weeks the physicians gave their approval. (6) In hesitating to permit the incision on January 7, 1943, the jury were influenced by the facts that respondent had suffered one excision September 14, one amputation December 1, and one incision December 17, 1942. It was not unreasonable for respondent to entertain fears on January 7, 1943, that perhaps the removal of the pocket of pus by scraping his wound might not be the wise course to follow after the use of drugs and submitting to three operations. (7) His fears on January 7 were justified by the stubborn course of the wound following the incision on March 26, 1943. (8) At the time he was advised to submit to a second incision (January 7, 1943) he had no temperature.

[8] While it is true that Doctor Shelton testified that he believed that by having amputation October 7, 1942, the period of respondent's hospitalization would have been materially abbreviated, yet in weighing the question of respondent's refusal to have the operation, the jury had the exclusive right to determine whether he was arbitrary or reasonable in his refusal. They could consider not only the eight facts above outlined but they could consider the uncertainty of medical opinion as frequently demonstrated. See Barham v. Widing, 210 Cal. 206, 215, 291 P. 173.

[9, 10] If the circumstances were such as to warrant the jury in finding that respondent exercised reasonable diligence in caring for his injury and used reasonable means to prevent its aggravation and to effect a complete cure, he was not obligated to undergo the amputation promptly when advised by his physician to do so solely because it might, by accomplishing a speedy healing of his wound, minimize the loss to be suffered by him whose negligence had caused the injury at first. Boa v. San Francisco-Oakland Terminal Railways, 182 Cal. 93, 101, 187 P. 2. Where the benefits to be gained by the refusal of a person who has been injured through the negligence of another to undergo a serious operation are doubtful, such refusal may be found not unreasonable even though such operation be advised by a competent physician. A plaintiff cannot be compelled to submit to an operation which would necessarily require the loss of a hand or a finger. This is especially true where the benefit to be derived from the operation is problematical and where therapeutic drugs have not already been tried. See Karberg v. Southern Pacific Co., 10 Cal.App.2d 234, 252, 52 P.2d 285; Burns Case, 298 Mass. 78, 9 N.E.2d 719, 720.

Appellant cites Stahura v. Industrial Commission, 103 Colo. 451, 86 P.2d 1080, and Overton v. City and County of Denver, 106 Colo. 114, 102 P.2d 474, both by the Supreme Court of Colorado on reviewing and *affirming* findings of the Industrial Commission. The effect of the holding in each case was a determination by the commission that the refusal to submit to the advised operation under the circumstances was negligence and that the applicant should be denied compensation for the time lost by his refusal to allow the operation. In Western Shade Cloth Co. v. Industrial Commission, 308 Ill. 554, 140 N.E. 45, 46, the Illinois court held that from the "character of the evidence" the advice of the doctors should have been followed, and that if the applicant had accepted their advice and taken the treatments the injury would not have been as serious as it turned out to be.

In Southern California Edison Co. v. Industrial Accident Commission, 75 Cal. App. 709, 243 P. 455, the company had offered to provide and had urged and recommended an operation pursuant to medical advice but from the outset the applicant refused to consent to such operation. Such facts bear no resemblance to those here involved where respondent's wish to avoid loss of the injured member was respected by both physician and surgeon who cooperated by the use of drugs and by excision of the ulcer and who were at the time of opinion that a grafting operation might succeed.

Basing his contention upon the hypothesis that respondent's refusal to submit to an amputation of his finger on September 1, 1942, resulted in the extension of his pain and suffering, his confinement to the hospital and absence from his work as well as in the enlargement of the hospital and medical charges, appellant contends that all losses suffered after November 1, 1942, should have been disallowed and that the judgment should be reversed by reason thereof. By reason of the evidence as above outlined and of the absence of any direct proof that respondent's expressed desire to defer the amputation was the cause of his losses after November 1, 1942, it cannot be said that the jury failed to exercise a reasonable discretion in impliedly finding that he justifiably deferred the amputation of his finger on September 1, 1942, and the incision on January 7, 1943.

No Excessive Damages.

[11-13] It cannot be said as a matter of law that the damages awarded were excessive in view of the pain and losses suffered and of the currently deflated value of the dollar. Butler v. Allen, 73 Cal.App. 2d 866, 167 P.2d 488. The power of the appellate court over excessive damages is invoked only when the facts are such that the excess appears as a matter of law or is such as to suggest, at first blush, passion, prejudice or corruption. Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234. When a trial court has refused to set aside a verdict on the ground that it is excessive it is the established rule that the verdict must stand unless it greatly exceeds a reasonable sum that might be fixed by enlightened men of sober judgment as reasonable compensation for the injuries suffered by the plaintiff in his situation at the time of and after the injury. If a verdict approved by the trial court does not shock the sense of justice and immediately induce a belief that the award was prompted by prejudice, passion or corruption, then the appellate court should not disturb the judgment. Koyer v. McComber, 12 Cal.2d 175, 182, 82 P.2d 941; Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 297 P. 35. The evidence of appellant's negligence and of respondent's long suffering and anxieties speak volumes for the general damages awarded.

No Prejudice in Giving or Refusing Instructions.

Many instructions given by the court are criticised as prejudicial without supplying references to the transcript. In fact the page on which a criticised instruction is found is specified in one instance only and that instruction is as follows:

"The issue to be determined in this case is whether or not the plaintiff sustained an X-ray burn on or about October 30, 1941, at the First Aid hospital on the premises of the California Shipbuilding Corporation. The burden is upon the plaintiff to prove by a preponderance of the evidence that he sustained an X-ray burn at the place and at or about the time stated. If you find that he did not sustain such a burn at or about said time and place, then the plaintiff is not entitled to recover. If you find that the plaintiff did sustain an X-ray burn at that time and place, you will find what damages plaintiff has suffered as a proximate result thereof and return a verdict in his favor for the amount of such damage. As indicated in this instruction, you should determine the question of liability before you undertake to fix any amount that would compensate for the damage if any as found to be suffered. Whenever in these instructions, I state that the burden or the burden of proof rests upon a certain party to prove a certain allegation by him, the meaning of such an instruction is that unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true."

[14] Of the foregoing appellant says that "the stipulation that if respondent sustained an X-ray burn on or about October 30, 1941, the individual causing the burn was unskillful or negligent and was a servant of defendant Stellar * * * merely relieved plaintiff of the burden of proving * * * that the individual responsible therefor was a servant of the defendant Stellar. The trial judge erroneously assumed that the stipulation relieved the plaintiff of his burden to prove that he sustained an X-ray burn of the kind and nature alleged. * * *" Also, he says the instruction ignored the proposition that plaintiff was under the burden of proving by a preponderance of evidence that his pain, trophic ulcer and the loss of his finger were the proximate result of roentgen dermatitis and first, second and third degree burns as alleged. He argues that the instruction was a formula instruction and requires a reversal of the judgment. It bears no resemblance to a formula instruction but if it should offend in such respect it will be observed that the rigid rules formerly applicable to formula instructions have been generously modified in recent years and that where the omitted matter has been fully, fairly and correctly covered by the court's charge and it is obvious that the jury was not misdirected, the omission of a substantial factor is not prejudicial. Dawson v. Boyd, 61 Cal.App.2d 471, 483, 143 P.2d 373.

[15, 16] Appellant asserts that the quoted instruction overlooks his defense of contributory negligence arising from respondent's neglecting to quit work and have his hand treated. But the court instructed the jury that in deciding whether there was negligence in a given case "the conduct must be considered in the light of all the surrounding circumstances as shown by the evidence"; that "the proximate cause of an injury is the cause which * * * produces the injury * * *"; that there may be two efficient causes; "whether proximate cause has been proved by a preponderance of the evidence, you should consider all the evidence * * *; any general damage or any item of special damage which the preponderance of evidence shows was a proximate result of any negligence on the part of the plaintiff cannot be included in any verdict you might render in favor of the plaintiff." The merits of one instruction cannot be fairly appraised by lifting it for analysis from the court's entire charge.

[17] Referring to another instruction appellant complains that the court unduly minimized the vice of failure of recollection of a witness. The instruction upon the measure of credibility and discrepancies in a witness' testimony does not vitally differ from the customary instruction upon that subject. While "failure of recollection is a common experience and innocent misrecollection is not uncommon" might be regarded as a gratuitous observation, it is nevertheless a truism and is harmless. No authority is known that denounces such a comment as prejudicial.

[18] While the customary form of telling the jury that they are "the exclusive judges of all questions of fact" was not used, still no prejudice can result from a slight variation in the language of the admonition. The court below told the jury "you are to decide this case solely upon the evidence received and the inference you may reasonably draw therefrom and such presumption as the law deduces therefrom," and "if during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party do not suffer yourselves to be influenced by any such suggestions. * * * If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it. * * * You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission * * * of a fact." Such language left no doubt of the court's meaning that the jury were exclusively to judge the facts in evidence. That they should determine the credibility of the wit-

nesses is shown by the instruction commencing: "In judging the credibility of a witness you shall * * *" This was followed by ten rules to be observed in appraising the value of a witness.

[19, 20] Assignment is made of the instruction to view with distrust weaker evidence offered by a party if the jury should find it was within the power of a party to produce stronger evidence, which appellant says was given at the request of respondent. No reference is made to any part of the record to show that respondent suggested it. Since it is not shown to have been requested by respondent it must be presumed to have been suggested by appellant (Cleveland v. Petrusich, 117 Cal.App. 71, 82, 3 P.2d 384; 24 Cal.Jur. sec. 118, p. 871, note 10; 2 Cal.Jur. sec. 509, p. 870, note 5), and therefore cannot constitute cause for reversal. In any event, the criticized instruction did not authorize the jury to reject anything. Taken as a whole it directed the jury to consider all the evidence before determining whether respondent received a third degree burn and whether the trophic ulcer was caused by the burn or by a trauma while respondent worked at the shipyards.

Appellant contends with fervor that the same instruction permitted the jury to reject the testimony of Doctor Meland that an amputation on August 31, 1942, was imperative as the only available cure, and the opinion of Doctor Shelton that respondent's refusal of an amputation on October 9, 1942, was contributory negligence. Nothing is noted either in the court's language or in the testimony to justify such an attack. Not only does the testimony of both physicians substantially reproduced herein show that neither insisted upon amputation when it was first suggested but it reveals that both believed that the ulcer might be supplanted by a grafting operation; that both collaborated to that end, and also that respondent submitted to the operation on the day specified for that undertaking. The jury were instructed that it was respondent's duty "to use the amount of care * * * exercised under the same circumstances by an ordinarily prudent person in order to avoid, if reasonably possible, any aggravation of the original injury; if an injured person fails to use such amount of care and such, if any, failure proximately contributes in any degree whatever to an aggravation of the original injury, then such person is not entitled to recover damages for such aggravation. * * *" The two physicians testified for respondent and supported his testimony that he received his X-ray burn at appellant's office October 30, 1941. Because they admitted that other causes may produce a trophic ulcer did not automatically strike all of their other testimony. The jury were so instructed that they might have determined that the ulcer was or was not caused by X-ray burn, or that it was caused by a trauma.

Appellant's extended defense of the testimony of the two physicians as being "entitled to full credit" is grave support for the jury's implied finding that the ulcer was caused by an X-ray burn.

[21] Assignment is made of the following instruction as prejudicial:

"If under the instructions you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you shall determine each of the items of claimed detriment which I am about to mention, provided, that you find it to have been suffered by him as *a* proximate result of the sustaining by plaintiff of an X-ray burn at the first-aid hospital on the premises of California Shipbuilding Corporation on or about October 30, 1941. * * *"

It is urged that the jurors were not cautioned in this or succeeding instructions that they could not include the entire cost of the services of physicians, entire value of time lost, in the total sum which would compensate for disfigurement, pain, discomfort and anxiety past and present. Such caution was unnecessary. The court's charge defined the two kinds of damages and specified the items constituting each.

[22, 23] Concerning the same instruction appellant stresses the use of "a" before proximate result instead of "the" as having the effect of relieving respondent of his share in causing his losses by aggravating the burn. He cites in support of such contention Hellman v. Los Angeles

Railway Corp., 135 Cal.App. 627, 645, 27 P.2d 946, 28 P.2d 384, and Dieterle v. Yellow Cab Co., 53 Cal.App.2d 691, 694, 128 P.2d 132. In the Hellman case the court said in the very passage quoted by appellant that "if such instruction stood alone, we would * * * declare it to be prejudicially erroneous." In the Dieterle case the appellants contended that the issue was changed by the use of "a" in an instruction before proximate cause instead of "the." In that case the question of concurrent negligence in causing the original injuries was an issue. In the case at bar there was no contributory negligence pleaded or urged as cause for the X-ray burn, but reliance is placed upon the failure of respondent to avoid aggravating the injury. This was properly covered by the court's instruction heretofore cited. The instructions as a whole advised the jury concerning the X-ray exposure of October 30, 1941, and directed them that a person injured "through the fault of another is bound to use the amount of care which would have been exercised under the same circumstances by an ordinarily prudent person in order to avoid, if reasonably possible, any aggravation of the original injury; if an injured person fails to use such amount of care and such, if any, failure proximately contributes in any degree whatever to an aggravation of the original injury, then such person is not entitled to recover damages for such aggravation, but is only entitled to recover damages for that portion of the pain or disability which is proximately caused by the original injury, unaffected by such, if any, aggravation thereof." This instruction made clear the issue presented by appellant's contention before the jury. Since the jury are presumed to have understood it and to have acted upon it, the criticised instruction could have had no influence in deflecting the jury's attention from the law given with respect to aggravation of injuries. In this connection it may be repeated that inasmuch as appellant has not pointed to any proof that respondent offered the criticized instruction it is presumed that it was the product of appellant's counsel. Cleveland v. Petrusich, supra.

[24-27] Appellant requested the court to read 16 instructions of his own invention and 26 from Baji (California Jury Instructions) and now complains that they were not all read to the jury. In the light of the record such a procedure would have been gross error if not calamitous, and cannot be commended as rendering aid to a court whose duty is to simplify the task of the jury rather than to make it more difficult. The 16 prepared instructions are in the main repetitious and argumentative and could have served no purpose but to confuse. With respect to the 26 Baji instructions, appellant says in his brief: "The court refused to give this group of instructions. (1, 2, 3, 4, 5, 6, 7, 8, 9, 21, 21b, 22, 22a, 23, 24, 25, 26, 27, 33, 101, 102, 103, 104, 104-a, 132, 136; also 133, after omitting negligence in the first line and the last sentence.) It selected some of them and refused to give the others. This request on the part of the defendant Stellar was not a request that the court single out certain of the Baji instructions contained in the group. It was a request that the court either give the group of instructions from Baji as requested or refuse to give said instructions as specified in the request." A novel demand indeed! The court properly incorporated such of the 26 Baji instructions as it deemed necessary. That some of those rejected might have been as desirable as those selected does not constitute prejudice. Baji 24, with respect to not being obliged to decide "in conformity with the testimony of a number of witnesses which does not produce conviction," etc., is an approved instruction. See Huddy v. Chronicle Publishing Co., 15 Cal.2d 554, 568, 103 P.2d 421. Baji 22 is matter briefly but effectively covered in the court's charge.

[28] Without further discussion of appellant's specious criticisms of the instructions and of the rejection of those offered it is sufficient to say that upon an examination of the entire cause including the evidence this court is persuaded that no instruction given or refused resulted in a miscarriage of justice and that therefore the judgment cannot be reversed. Constitution, Art. VI, Sec. 4½.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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McMAHON v. SUPERIOR COURT et al.

L. A. 19765.

Supreme Court of California, in Bank.
Dec. 23, 1946.

1. Appeal and error ⚿2

An appeal from judgment entered in determination of final account of former special administrator who was appointed April 17, 1944, was governed by rules on appeal which became effective July 1, 1943. Rules on Appeal, rules 4(b, d), 51(b, d), 8(a, b).

2. Appeal and error ⚿612(2)

Under rules on appeal, trial judge is not charged with function of settling or certifying all transcripts, and in absence of request for correction of alleged mistake, record is transmitted with certification of reporter. Rules on Appeal, rules 4(d), 5(d), 8(a).

3. Appeal and error ⚿609

Under rules on appeal, transcript cannot be objected to on ground of lack of completeness, and remedy of respondent desiring complete transcript is to designate the balance thereof. Rules on Appeal, rules 4(b), 5(b).

4. Appeal and error ⚿618

Under rules on appeal, trial judge must hear and determine request of either party for corrections in transcript and must thereafter certify the transcripts with such corrections, if any, as he may allow. Rules on Appeal, rule 8(b).

5. Appeal and error ⚿607(1)

The issue whether judgment has been satisfied and consequently right of appeal therefrom has been lost is for reviewing court and not for trial judge on motion to settle the transcripts.

6. Appeal and error ⚿607(1)

The trial judge cannot refuse to allow record to be filed in reviewing court on ground that judgment is non-appealable in opinion of trial judge.

Mandamus proceeding by John J. McMahon against the Superior Court of the state of California and Thurmond Clarke, Judge thereof, to compel the respondents to settle and certify transcripts on an appeal.

Writ granted.

John J. McMahon, in pro. per., and William R. Law, of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Arthur E. Schifferman and C. E. Spencer, all of Los Angeles, for respondents.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel respondents to "settle and certify" the clerk's and reporter's transcripts on an appeal taken from a judgment entered in determination of the final account of the former special administrator in an estate proceeding. The mandamus petition was consolidated for oral argument with a motion to dismiss several appeals in this estate proceeding pending in this court. Estate of Merrill, Cal.Sup., 175 P.2d 819.

Petitioner premises his application for relief on these facts of record herein: On April 17, 1944, one Fred B. Merrill was appointed special administrator of the Estate of Rae S. Merrill, deceased. Petitioner was his attorney. On October 16, 1945, Merrill's letters were "revoked and declared null and void as of and from the date of issuance thereof" on the ground that he had procured his appointment by a fraud upon the court, and it was ordered that he file "within 10 days * * * his verified final accounting, showing * * * the condition of the estate." One Helen Hillin was then appointed and qualified as executrix of the last will of the deceased. Thereafter and in the latter part of October, 1945, Merrill filed his final account as special administrator and referred therein to his previously rendered first and second accounts which had not been noticed for hearing at the respective dates of filing—December 19, 1944, and July 17, 1945. The accounts showed attorney fees paid to petitioner, certain fees paid to the special administrator, and other costs and disbursements. The executrix and one Evelyn M.

Aumick, pretermitted heir under the last will of the deceased, filed objections to the accounts. At the hearing of the accounting matter, petitioner appeared on behalf of the former special administrator and "also in his own behalf as attorney petitioning in and by said accounts for fees" declared "in excess of $7,000." On December 19, 1945, the court made findings of facts and conclusions of law, and rendered judgment, denying the claims of the former special administrator and petitioner, his attorney.

Among other things, the court found that Merrill was "entitled to no allowance" for fees or commissions because his "acting as special administrator delayed the appointment of the executrix herein and delayed the administration and settlement of this estate," and by reason of the added fact that he "was removed by this court for fraud in the procurement of his appointment and for waste"; that petitioner "was instrumental in procuring the appointment of" Merrill "as special administrator and participated in and procured the said appointment by failure to disclose all facts known to him to the judge making the appointment"; that "all acts of" petitioner had been done "in pursuance of attempts to keep said Merrill in office" and petitioner had rendered "no service [which] resulted in any benefit to the estate"; that petitioner was "entitled to no allowance for fees for extraordinary services" and Merrill was "entitled to no credit for sums paid" to petitioner; and that petitioner was entitled to "no allowance for ordinary fees" inasmuch as "the commissions for ordinary services must be divided between the attorney for the executrix and an attorney for a special administrator regularly appointed."

The court further found and the ensuing judgment recites:

"That said Fred B. Merrill has wrongfully expended from the funds of said estate the sum of $4,191.90, and he is hereby ordered to forthwith restore said sum to said estate, and to deliver the same to said Helen Hillin, as executrix of said estate * * * and * * * said Helen Hillin, as such executrix, shall have and recover the said sum of $4,191.90 from said Fred B. Merrill, together with interest thereon from the date of this judgment until paid at the rate of seven per cent per annum; that said John J. McMahon, attorney for said Fred B. Merrill, while acting as attorney for him in the matter of this estate, secured from said Fred B. Merrill for his own benefit without order of or approval of this court, the sum of $3,790.90, and he shall forthwith restore said sum to said estate and deliver the same to said Helen Hillin, as executrix of said estate, and, in addition, to all other remedies provided by law, said Helen Hillin, as such executrix, shall have and recover the said sum of $3,790.90 from said John J. McMahon, together with interest thereon from the date of this judgment until paid at the rate of seven per cent per annum; that all sums over and above the sum of $401 which shall be paid by said Fred B. Merrill to said executrix on said sum of $4,191.90 shall be credited on said sum of $3,790.90 so found due from said McMahon to said executrix, and all sums which may be paid by said McMahon on the sum found due from him to said executrix shall be credited on said sum of $4,191.90 so found due from said Merrill to said executrix; * * *."

Petitioner, on behalf of Merrill and himself individually, filed timely separate notices of appeal from the judgment as above recited and likewise made requests for preparation of the clerk's and reporter's transcripts of the proceedings in pursuance of said appeals. These transcripts were filed in the court below on February 28 and March 6, 1946, respectively. Thereafter written objection was made to the settlement of the transcripts upon the ground, among others, that they were "not a full and complete transcript of the proceedings had at the trial of the matter resulting in the judgment from which [the] appeal [was] taken." On April 1, 1946, allegedly without the knowledge or consent of petitioner, Merrill paid the amount of the judgment in full and was given a satisfaction of judgment running in favor of himself and petitioner. Merrill thereupon signed a withdrawal of his appeal, prepared by counsel for the executrix, and said withdrawal was filed in the estate proceeding. Thereafter and on April 15, 1946, petitioner's "request for settlement of the transcripts" was heard and counsel for the executrix made oral objection to petitioner's right to prosecute said appeal, upon the ground that the matter had become moot as a consequence of Merrill's payment of the judgment. After hearing argument on the disputed point, the court made its order sustaining the objection and denying the "motion to settle the transcripts."

[1-4] It is apparent that the parties have been proceeding under the practice which obtained prior to the adoption of the new Rules on Appeal (22 Cal.2d 1), although these rules, which became effective July 1, 1943, are applicable to and govern this case. Under the new rules the trial judge is not charged with the function of "settling" or certifying all transcripts; in the absence of a request for correction of an alleged mistake, the record is transmitted with the certification of the reporter (Rule 4(d), 22 Cal.2d 4) and of the clerk. Rules 5(d), 8(a), 22 Cal.2d 5, 6, 8. The petition herein discloses that respondents in the main appeal filed a document entitled "Objection to Settlement of Transcripts, Etc.," in part on the ground that they did not constitute "a full and complete transcript of the proceedings"; and that petitioner filed an "Answer to Objections re Settlement of Transcripts," in which he stated that he was forwarding to the court "corrections" to be noted in the reporter's transcript. The objection on the ground of lack of completeness is no longer tenable, and the remedy of a respondent, if he desires a complete transcript, is to designate the balance thereof. Rules 4(b), 5(b), 22 Cal.2d 3, 5. If, however, corrections have been requested by either party, it is the duty of the trial judge to hear and determine the request, and thereafter to certify the transcripts, with such corrections, if any, as he may allow. Rule 8(b), 22 Cal. 2d 8, 9.

[5, 6] The chief ground upon which it is contended that the trial judge properly based the order granting the objection of respondents in the main appeal and denying "the motion to settle the transcripts" is that the judgment had been satisfied and consequently the right of appeal therefrom had been lost. This issue is, however, a matter for the reviewing court to decide, and is decided in favor of petitioner in Estate of Merrill, Cal.Sup., 175 P.2d 819, this day filed. But in any event the trial judge cannot refuse to allow the record to be filed in the reviewing court on the ground that the judgment is, in his opinion, nonappealable.

Let a peremptory writ of mandate issue directing respondents to determine the request for correction of the transcripts, and thereafter to certify the transcripts as correct.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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29 Cal.2d 520

In re MERRILL'S ESTATE.

AUMICK et al. v. MERRILL.

L. A. 19872.

Supreme Court of California, in Bank.

Dec. 23, 1946.

1. Executors and administrators 🔑510(12)

An appeal by former special administrator from judgment entered in settlement of his final account, ordering him to pay certain sums to executrix, should be dismissed, where former special administrator had voluntarily paid such judgment and had abandoned his appeal. Code Civ. Proc. § 1049.

2. Appeal and error 🔑110

An order denying a motion for a new trial is nonappealable.

3. Appeal and error 🔑117, 870(1)

An appeal from order refusing to settle transcript on appeal on ground that judgment had been satisfied and consequently right of appeal therefrom had been lost served no useful purpose and would be dismissed, since issue as to satisfaction of judgment and loss of right of appeal would be decided on appeal from the judgment.

4. Executors and administrators ⚷510(12)

Where attorney for former special administrator, in attorney's own behalf and in behalf of former special administrator, appealed from judgment in final accounting proceeding making former special administrator and attorney jointly liable for amount ordered to be paid to executrix, attorney's subsequent appeals from judgment individually and as an interested party in the estate would be dismissed as superfluous.

5. Appeal and error ⚷150(6)
Executors and administrators ⚷429

An attorney may proceed independently and maintain an action or an appeal for fees for services rendered during administration of estate. Probate Code, §§ 469, 911, 1240.

6. Appeal and error ⚷781(7)

Voluntary satisfaction of judgment deprives party of right of appeal only where payment of judgment is by way of compromise or with agreement not to take or prosecute appeal.

7. Appeal and error ⚷781(7)

The payment of judgment by joint obligor without knowledge or consent of the other obligor did not destroy the other obligor's right to appeal from judgment. Code Civ.Proc. § 1049.

8. Executors and administrators ⚷510(12)

Special administrator's voluntary payment of judgment in final accounting proceeding making former special administrator and his attorney jointly liable for payment of certain sum to executrix, did not render moot considerations affecting attorney's status in the estate proceeding, in respect to legal basis of adverse ruling upon full scope of attorney's claim for compensation, and related impropriety of findings adjudging attorney guilty of fraud in the premises.

Appeals from Superior Court, Los Angeles County.

Proceeding in the matter of the estate of Rae S. Merrill, wherein Fred B. Merrill was appointed special administrator. Fred B. Merrill was removed as special administrator and was ordered to account, and Helen Hillin was appointed as executrix. The executrix and Evelyn M. Aumick, pretermitted heir under the last will of deceased, filed objections to the accounts filed by the former special administrator. A judgment was entered ordering the former special administrator to pay certain sums to the executrix. As to one such sum, the former special administrator and his attorney, John J. McMahon, were made jointly liable. Appeals were taken on behalf of the former special administrator and by John J. McMahon on his own behalf.

All appeals but one dismissed on motion.

John J. McMahon, of Los Angeles, for appellant.

Arthur E. Schifferman and C. E. Spencer, both of Los Angeles, for respondents.

SPENCE, Justice.

This is a motion to dismiss five appeals on the ground that the principal judgment from which the appeals stem "has been fully paid and satisfied, and all questions relating thereto are now moot." A "Certificate Re Dismissal," prepared by the county clerk and filed as provided by Rule 42, Rules on Appeal (22 Cal.2d 1, 29), shows the following chronology of events pertinent to the disposition of said motion.

On December 19, 1945, judgment was entered in settlement of the final account of the former special administrator. The court had previously ordered his removal as representative of the estate and appointed one Helen Hillin to act as executrix therein. Objections to the accounting were filed by the executrix and one Evelyn M. Aumick, and except as to a negligible amount of expense, they were sustained as to all items listed, including fees sought on behalf of the former special administrator and his attorney, John J. McMahon. Accordingly, the judgment ordered the former special administrator to pay to the executrix the sum of $2,974.90 then in his hands as property of the estate and to restore the further sum of $4,191.90 wrongfully expended by him, including $3,790.90 paid as attorney fees to John J. McMahon. With respect to this latter item, both the former special administrator and his attorney, John J. McMahon, were made jointly liable.

On December 21, 1945, the following papers were filed by said John J. McMahon: two separate notices of appeal from the judgment, one on behalf of the former special administrator and one on his own behalf; corresponding requests to prepare the transcipts on the respective appeals; and a motion for a new trial. On January 10, 1946, another notice of appeal from the judgment was filed by said John J. McMahon "individually and as an interested party" in the estate. On January 14, 1946, partial satisfaction of the judgment was made by the former special administrator so that there was left still outstanding only the sum of $3,790.90, the amount of the attorney fees for which both he and John J. McMahon were jointly liable. On January 24, 1946, the following events occurred: the motion for a new trial was denied; the former special administrator "substituted himself, in propria persona, in the place and stead of his counsel of record"; and he filed a "withdrawal of all appeals and motions" theretofore taken or made in his behalf. On January 28, 1946, said John J. McMahon again filed "individually and as an interested party" in the estate another notice of appeal declaring it to be taken from the judgment of December 19, 1945, and also from the order of January 24, 1946, denying the motion for a new trial. An appropriate request to prepare transcripts likewise accompanied this latter notice. The clerk's transcript and the reporter's transcript were filed on February 28 and March 6, 1946, respectively. On April 1, 1946, the former special administrator paid the balance of the judgment and a full satisfaction thereof was filed in the estate proceeding. Thereafter and on April 15, 1946, a "motion for settlement of the transcripts" was heard and denied. On April 17, 1946, said John J. McMahon, designating himself as having "a special interest in the * * * estate" and "also a creditor thereof," filed a notice of appeal from said order of April 15, 1946, and an accompanying request to prepare transcripts with respect to said latter appeal.

It is readily apparent from the above recital that there is considerable confusion and duplication in the appeal proceedings in this estate matter. In order to clarify this condition of the record and make disposition of the present motion for dismissal, the appeals will be separately discussed.

[1] The appeal of December 21, 1945, taken on behalf of the former special administrator from the judgment of December 19, 1945, should be dismissed since he has voluntarily paid said judgment (Code Civ.Proc. § 1049) and has abandoned his appeal therefrom. 2 Cal.Jur. 224.

[2] The appeal of December 21, 1945, taken by John J. McMahon on his own behalf from the judgment of December 19, 1945, appears to be identical in substance with the appeals likewise taken by him on January 10 and January 28, 1946, except that the latter in addition includes an appeal from the order denying a motion for a new trial on January 24, 1946. The latter order is nonappealable (Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692) so that reference thereto adds no force to the January 28 notice of appeal.

[3] The appeal of April 17, 1946, taken by said John J. McMahon from the order of April 15, 1946, refusing to "settle" the transcripts on appeal, serves no useful purpose and may be dismissed. See McMahon v. Superior Court, Cal.Sup., 175 P.2d 817, for a full discussion of this point.

[4, 5] There remains for consideration the motion to dismiss McMahon's appeal from the principal judgment (his subsequent appeals of January 10 and January 28, 1946, from the same judgment should be dismissed as superfluous and unnecessary to the protection of his rights). Under authority of section 911 of the Probate Code, "An attorney may proceed independently and maintain an action or an appeal" for fees "For services rendered during administration of an estate." Stafford v. Superior Court, 1 Cal.2d 321, 324, 34 P.2d 998. More particular in specification is section 469 of said code, which was enacted in 1941 and which provides that "Any at-

torney who has rendered extraordinary services to the special administrator may apply to the court for compensation" therefor "Out of the estate." The refusal to make an order "Directing or allowing the payment of * * * [such] attorney's fee" is appealable by virtue of section 1240 of the Probate Code. However, in opposition to McMahon's pursuance of his right of appeal, the argument is made that "the judgment had been satisfied and the question had become moot" so that a decision of the cause on appeal would serve no useful purpose. But such conclusion does not follow under the facts of record herein and the law applicable thereto.

The judgment in question was entered in disposition of the issues raised with respect to the final accounting of the former special administrator and it expressly made McMahon a party to its terms. At the hearing McMahon had appeared in his own behalf as attorney, petitioning in and by the accounts of the former special administrator for fees "in excess of $7,000.00," but his claim was adversely determined in the ruling that he was entitled to no allowance "out of the estate." Such determination was premised upon findings of fraud in the special administrator's procurement of his appointment and in McMahon's participation therein as attorney. Accordingly, both McMahon and the former special administrator were adjudged jointly liable to the executrix for the return of the fees, $3,790.90, which the special administrator in the course of his administration of the estate had paid to McMahon. But such money decree does not mark the limit of McMahon's concern herein, for it is apparent that the judgment affected his pecuniary interests not simply to the extent of the restoration of funds he had received "out of the estate" but also to the extent of his petition for a further allowance for alleged services to the estate during the time the special administrator was acting as the representative thereof, a period of eighteen months. Moreover, the findings of fraud embraced in the adverse ruling against McMahon's fee claims in the estate constituted a direct attack upon his integrity and conduct as an attorney, and which, if they become final, may well constitute the basis of disciplinary proceedings against him. These are matters which McMahon maintains were erroneously adjudicated by the court and which he has the right to have reviewed on the merits.

[6, 7] It is established in this state that the general rule that the voluntary satisfaction of a judgment deprives a party of the right of appeal is subject to certain other well-settled principles of law. Hartke v. Abbott, 106 Cal.App. 388, 391, 289 P. 206. In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal. Warner Bros. Co. v. Freud, 131 Cal. 639, 645, 63 P. 1017, 82 Am.St.Rep. 400; Patterson v. Keeney, 165 Cal. 465, 466, 132 P. 1043, Ann.Cas. 1914D, 232. In the present case a different situation is presented in that there was no voluntary satisfaction of the judgment by McMahon, the party seeking to proceed with the appeal, but rather the judgment was paid by his joint obligor, without McMahon's knowledge or consent. Under these circumstances showing that the judgment was satisfied without the acquiescence of McMahon, section 1049 of the Code of Civil Procedure cannot be invoked to impair or destroy his right of appeal. Hartke v. Abbott, supra, 106 Cal.App. at page 391, 289 P. 206.

[8] Manifestly, payment of the money decree by McMahon's joint obligor did not render moot these additional considerations affecting McMahon's status in the estate proceeding: (1) The legal basis of the adverse ruling upon the full scope of his claim for compensation; and (2) the related impropriety of the findings adjudging him guilty of fraud in the premises. If McMahon is not allowed to proceed with his appeal, the judgment in question would attain finality as to these issues without his having the opportunity to test before an appellate court the merits of their adjudication adverse to him. Such termination of this litigation would not accord with sound principles of legal practice and substantial justice. The appeal taken by McMahon should be determined on its merits.

Metcalf v. Drew, 75 Cal.App.2d 866, 171 P.2d 488.

In line with the foregoing observations, the motion to dismiss is granted as to the appeal taken on behalf of the former special administrator. It is likewise granted as to all appeals taken herein by John J. McMahon on his own behalf except that of December 21, 1945, as to which the motion is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

29 Cal.2d 492

LUMBERMEN'S MUT. CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19786.

Supreme Court of California, in Bank.
Dec. 19, 1946.

1. Workmen's compensation 🔑1939

Conflict in evidence as to whether disability arose out of and in course of employment was for Industrial Accident Commission.

2. Workmen's compensation 🔑1535

Evidence authorized finding by Industrial Accident Commission that partial paralysis of employee's right side as the result of arterial hypertension complicated by cerebral apoplexy was brought on by long hours of work and arose out of and in the course of his employment. Labor Code, § 5313.

3. Workmen's compensation 🔑610

Reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of employee.

4. Workmen's compensation 🔑1536

Where an employee suffers a heart attack brought on by strain and over-exertion incident to his employment, injury or death is compensable, even though the idiopathic condition previously existed, and no traumatic injury or unusual exertion or strain or other than that occurring in normal course of employment is necessary.

5. Workmen's compensation 🔑570

Where employee's injury in nature of over-work was developing arterial hypertension during period of employment, which disease was complicated by cerebral apoplexy resulting in partial paralysis of one side, Industrial Commission was justified in fixing last day of employment as the critical date, notwithstanding that nothing happened to employee on that day. Labor Code, § 5313.

6. Workmen's compensation 🔑1742, 1745

Finding that employee sustained injury arising out of and in the course of his employment consisting of cerebral apoplexy was sufficient as against contentions that it was a mere conclusion of law and that hearing referee's report showed failure to rely upon medical testimony. Labor Code, § 5313.

7. Workmen's compensation 🔑1744

Findings of the Industrial Accident Commission are sufficient if they are findings of ultimate facts, and findings on special probative facts are not required. Labor Code, §§ 5313, 5800, 5953.

8. Workmen's compensation 🔑1846

Point not raised before Industrial Accident Commission cannot be raised on petition for review.

9. Workmen's compensation 🔑1396

Rule of Industrial Accident Commission as to form and contents of physician's report is directory rather than mandatory and, while it expresses policy of commission, it does not necessarily preclude commission from accepting a report which does not comply.

10. Workmen's compensation 🔑1418

The failure of a physician's report to Industrial Accident Commission to state reason for expert opinion contained therein does not strip report of probative value, since such failure goes to weight of evidence, a matter for commission, and since adversary has right to cross-examine.

11. Evidence ⚷555

Where an expert witness bases his scientific opinion on his observations such as an attending or treating physician observing his patient, he need not state reasons for his opinion or the facts upon which opinion is based.

12. Constitutional law ⚷318

The requirement of due process, that one who determines the facts must consider the evidence, permits a procedure by which evidence is taken by an examiner and sifted and analyzed by subordinates with the determination of adjudicating body based upon such analysis.

13. Workmen's compensation ⚷1935

Where findings and award, purportedly signed by hearing referee, were issued under the name of, and bore seal of, Industrial Accident Commission, in the absence of a showing that Commission did not consider case and authorize affixation of seal, under presumption that official duty was performed, it was presumed that commission acted upon and considered the case. Code Civ.Proc. § 1963, subd. 15.

14. Constitutional law ⚷301

Testimony given in an investigation by a legislative committee of procedure before Industrial Accident Commission indicating that commission fails to really consider the evidence and cases after a hearing by referee but acts pro forma cannot control a specific case nor be a basis to support charge that petitioners were denied due process of law therein without some evidence that Commission so acted in such specific case. Labor Code, § 115.

15. Workmen's compensation ⚷1730

The seal of the Industrial Accident Commission attached to an award gives rise to a presumption that commission had approved the findings and award as prepared by hearing referee and ordered their filing. Code Civ.Proc. § 1963, subd. 15; Labor Code, § 115.

16. Constitutional law ⚷301

Denial by Industrial Accident Commission of a petition for a rehearing in a closed session was not a denial of due process. Labor Code, § 5906.

17. Workmen's compensation ⚷1800

The Industrial Accident Commission is not required to accept a recommendation of a referee to grant a rehearing and law is satisfied when commission weighs the hearing referee's report and record against rehearing referee's report. Labor Code, § 5906.

Proceeding on the petition of Lumbermen's Mutual Casualty Company and Guy F. Arkinson Company for a review of an award by the Industrial Accident Commission of compensation to Joseph M. Cacozza.

Award affirmed.

Prior opinion, 168 P.2d 979.

J. L. Kearney, Herbert S. McCartney and Howard J. Scott, all of Los Angeles, for petitioners.

R. C. McKellips, of San Francisco, and Edward A. Sarkisian, of Los Angeles, for respondents.

CARTER, Justice.

Joseph M. Cacozza, an employee, aged 56 years, was awarded compensation by the Industrial Accident Commission for injuries consisting of partial paralysis of his right side. He returned home from work about 5 o'clock in the afternoon of February 7, 1945, and was apparently in good health when he retired at 10 o'clock that evening. About 4 a.m. he awoke and went to the bathroom. At that time he felt dizzy. He returned to bed and when he was awakened by the alarm clock at 6 o'clock his right side was partially paralyzed, a condition which has continued with only a slight improvement.

The causal connection between the employment and applicant's disability, that is, the question of whether the disability arose out of and occurred in the course of his employment rests upon the following showing: The report of Dr. Daley, the physician who attended and treated Cacozza, states that the latter is suffering with "Arterial Hypertension complicated by Cerebral Apoplexy," and that "Prior to the vascular accident, Mr. Cacozza's work entailed long hours which undoubtedly caused him to become tense and fatigued." In another report Dr. Daley states that Cacozza has arterial hypertension complicated by cerebral "accident" and has a "one sided weakness that goes hand in hand with a vascular accident, (apoplectic stroke)." Dr. Petter also treated Cacozza, and according to his report, he treated him for a stroke of apoplexy which "came on suddenly" on February 8, 1945, and the condition "was brought about by excessive overwork and long hours with no relief." Cacozza testified that he had been in good health and had had no illness prior to the attack except a traumatic injury to his right side a year previous. About five years before this injury he had obtained a policy of life insurance, and at that time had a physical examination. He smoked very lightly during the two or three years prior to the stroke and drank none. He stated that the long hours he worked (later mentioned) made him more tired than he had been in his work theretofore. The employer's carrier's doctor made a detailed report of his examination of Cacozza and diagnosed the case as: "1) Generalized arteriosclerosis. 2) Cerebro-vascular arteriosclerosis. 3) Arterial Hypertension. 4) Early arteriosclerotic heart disease, with beginning left ventricular enlargement. 5) Cerebral thrombosis with right hemiparesis." And concludes: "this man's generalized and cerebrovascular arteriosclerosis and arterial hypertension have been present for months and probably years. This is based upon the present state of the sclerosis of the palpable and visible arteries. This process in the main is one of degeneration and senescence and is not increased or aggravated by occupation, except where unusual lifting or straining temporarily raises the blood pressure above the usual levels, which places excessive strain upon already weakened arteries and results in a rupture. This phenomenon may occur any place in the body, but usually occurs within the cranial vault or the heart. That is not true in this instance. This man's lesion is a thrombus formation in an already damaged artery within the brain and this formation was facilitated by the decreased blood flow which occurs when the patient is at rest. In this particular instance it came on during the night. His occupation the preceding week, or the preceding month, had no direct influence upon the state of that particular artery or the formation of the clot.

"Therefore, in conclusion, it is my opinion that there is no causal relationship between this man's occupation and his cerebral vascular thrombosis and hemiparesis and, in fact, it might be argued that his active life temporarily inhibited the formation of an intra-vascular clot and this accident occurred in spite of rather than because of his occupation."

Cacozza began working for the employer, Guy F. Atkinson Company, in October, 1944, spending the first month in carpenter work. Thereafter he was the operator of a derrick engaged in loading barges. That work required him to manipulate levers with his hands and feet while seated. He stated that the work was lighter than carpenter work, but he also stated he became more tired from the derrick work because of the long hours. He testified that he worked 10 to as much as 19 hours per day and his repeated request for relief was denied. The employer's record of Cacozza's employment shows that his hours of work varied from 8 to 20½ per day, most days being over 10 hours. It is true the employer's payroll record contains the statement that it shows the hours of employment but does not reflect the actual hours of work because the employee was on duty but actually working only when loading barges. That does not necessarily mean that he was not loading barges most of the time while on duty. Cacozza testified he "worked" the long hours and he was at least on duty during all the time shown by the record. Nothing more than a conflict is created. The two days before he suffered the stroke he had worked 9 and 10 hours respectively. Most of the time he worked seven days a week. He testified that he had only such time for lunch as it would take to consume it, 15 to 30 minutes.

[1-3] From the foregoing it is apparent that there is a conflict in the evidence and that conflict has been resolved by the commission in favor of the employee. There is evidence that he was working long hours

without relief, an incident of his employment, coupled with the reports of his doctor that his condition was due to that incident of employment. Hence the evidence is sufficient to establish that the injury occurred in the course and arose out of the employment, especially in light of the rule that all reasonable doubts as to whether an injury arose out of the employment are to be resolved in favor of the employee. Truck Ins. Exchange v. Industrial Acc. Comm., 27 Cal. 2d 813, 167 P.2d 705.

[4] Where an employee suffers a heart attack brought on by strain and overexertion incident to his employment the injury or death is compensable, even though the idiopathic condition previously existed, and no traumatic injury is necessary. Buckley v. Roche, 214 Cal. 241, 4 P.2d 929; Fogarty v. Department of Indus. Relations, 206 Cal. 102, 273 P. 791; Knock v. Industrial Acc. Comm., 200 Cal. 456, 253 P. 712; George L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 594, 200 P. 17; Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 166 P.2d 908; Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714; Blankenfeld v. Industrial Acc. Comm., 36 Cal.App.2d 690, 98 P.2d 584; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P.2d 1071; Peters v. Sacramento City E. R. System, 27 Cal.App.2d 10, 80 P.2d 179; McNamara v. Industrial Acc. Comm., 130 Cal.App. 284, 20 P.2d 53; Nielsen v. Industrial Acc. Comm., 125 Cal.App. 210, 13 P.2d 517; Singlaub v. Industrial Acc. Comm., 87 Cal. App. 324, 262 P. 411; see cases collected 9 N.C.C.A.,N.S., 335 et seq.; Carroll v. Industrial Commission, 69 Colo. 473, 195 P. 1097, 19 A.L.R. 110; 28 A.L.R. 204, 209; 60 A.L.R. 1299, 1314. That it is not required that the exertion or strain be necessarily unusual or other than that occurring in the normal course of the employment is evident. In Liberty Mut. Ins. Co. v. Industrial Acc. Comm., supra, at page 563 of 73 Cal.App.2d, at page 913 of 166 P.2d, the court making a comprehensive review of the authorities in regard to the aggravation of a previous condition caused by the employment states: "The cases do not, and in the nature of things cannot, stand for the proposition that the exertion must be unusual before it is compensable. * * * In such a case whether the strain is a 'usual' or an 'unusual' one is only one of the facts involved. If there was strain, even though the strain was a strain usual to that type of employment, the injury or death is compensable if there is competent substantial evidence to show the causal connection between that strain and the collapse." In the following cases the injury was held to be employment connected. Knock v. Industrial Acc. Comm., supra, involved an employment requiring the employee to walk over somewhat difficult terrain at an elevation of 3300 feet. (An altitude higher than that to which the employee was accustomed.) A heart attack followed. Fogarty v. Department of Industrial Relations, supra, dealt with an employee who was engaged as a carpenter working on a flume. He worked long hours in repairing a break in a flume under conditions of changing temperature and wet clothes followed by rheumatism and heart attack. Buckley v. Roche, supra, although concerned with pension rights rather than workmen's compensation, applied the rule applicable to the latter field of law and determined that a heart attack following the ascension of stairs by a policeman in the usual course of his duties arose out of his employment, the court stating at page 247 of 214 Cal., at page 932 of 4 P.2d: "The climbing of a spiral stairway of twenty-four steps, *even if it were a part of the routine service of Buckley,* according to the stipulation produced the heart spasm which caused his death. The exertion of ascending the stairway, therefore, caused the injury which produced his death. As he was required in the course of his employment to ascend this stairway, the injury caused thereby was an injury received while in the performance of his duty." [Emphasis added.] See, similarly, Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537. Mark v. Industrial Acc. Comm., supra, dealt with a farm worker who lifted a heavy motor and cranked a truck—he was tired and exhausted. The commission's denial of an award to the employee's dependents was annulled. Blakenfeld v. Industrial Accident Commis-

sion, supra [36 Cal.App.2d 690, 98 P.2d 585], reversed a denial of compensation where a heart attack was suffered after lifting a heavy object although the work called for "Doing heavy work including the lifting and moving of heavy objects." A case closely analogous to the one at bar is Hoage v. Royal Indemnity Co., 67 App.D.C. 142, 90 F.2d 387, certiorari denied Royal Indemnity Co. v. Cardillo, 302 U.S. 736, 58 S.Ct. 122, 82 L.Ed. 569, and rehearing denied 302 U.S. 778, 58 S.Ct. 270, 82 L.Ed. 602. There the employee, an adjuster for an insurance company, suffered collapse from angina pectoris, after being required to work long hours. Compensation was allowed. The court quoted from Commercial Casualty Insurance Co. v. Hoage, 64 App. D.C. 158, 75 F.2d 677, 678: "It has been held a number of times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work, and likewise that the injury need not be external." See to the same effect, Harbor Marine Contracting Co. v. Lowe, 2 Cir., 152 F.2d 845.

[5] Petitioner argues that there is no evidence of any injury on February 7, 1945, the date found by the commission inasmuch as nothing happened to Cacozza on that day and he worked only 10 hours. That may be true but the evidence does show that the accumulated effects of the overwork ultimately culminated in the disability that manifested itself on February 8, 1945. The injury, the overwork, was developing the disease all during the period of his employment, and February 7, 1945, was the last day of that process which without further work or activity in the employment became disabling the following day.

[6, 7] Petitioner urges that the findings of the commission that Cacozza sustained injury "arising out of and occurring in the course of his employment consisting of a cerebral apoplexy" is a mere conclusion of law, hence insufficient and in that connection that the hearing referee's report shows failure to rely upon any medical testimony. The finding is clearly sufficient. The Labor Code provides that the referee shall report in writing to the commission his findings, and the facts found and conclusions of law shall be separately stated (Lab.Code, § 5313); and that the commission shall make and file "Its findings upon all facts involved in the controversy. (b) Its order, decision, or award stating its determination as to the rights of the parties." (Lab.Code, § 5800.) The findings and conclusions of the commission on questions of fact are conclusive and final, and "Such questions of fact shall include ultimate facts and the findings and conclusions of the commission." (Lab.Code, § 5953.) Finding the ultimate facts is sufficient. Findings on special probative facts are not required. Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Walter v. Industrial Acc. Comm., 209 Cal. 635, 289 P. 627; Harlan v. Industrial Acc. Comm., 194 Cal. 352, 228 P. 654; Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 705, 151 P. 398; La Fountain v. Industrial Acc. Comm., 13 Cal.App.2d 130, 56 P.2d 257; General Petroleum Corp. v. Industrial Acc. Comm., 90 Cal.App. 101, 265 P. 508; Clarke v. Industrial Acc. Comm., 87 Cal.App. 766, 262 P. 471; Smith v. Industrial Acc. Comm., 26 Cal.App. 560, 147 P. 600. A finding of the ultimate facts in the words of the statute is sufficient. See Western Indemnity Co. v. Pillsbury, supra; Harlan v. Industrial Acc. Comm., supra; Walter v. Industrial Acc. Comm., supra. For example, the following are sufficient: A finding that an employee's death or injury was or was not caused by an injury arising out of and occurring in the course of employment. Walter v. Industrial Acc. Comm., supra; Hartford A. & I. Co. v. Industrial Acc. Comm., 12 Cal.App.2d 739, 55 P.2d 1275. A finding that the employer was guilty of serious and wilful misconduct. Ethel D. Co. v. Industrial Acc. Comm., supra; General P. Corp. v. Industrial Acc. Comm., supra; Clarke v. Industrial Acc. Comm., supra; Dawson v. Industrial Acc. Comm., 54 Cal. App.2d 594, 129 P.2d 479; Vega Aircraft v. Industrial Acc. Comm., 27 Cal.2d 529, 165 P.2d 665. The case of Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 100 P.2d 511, relied upon by petitioner, insofar as it holds

that a finding that there was serious and wilful misconduct is insufficient, is out of harmony with the foregoing authorities, and is disapproved.

[8, 9] Criticism is made of the reports of Cacozza's doctors; that no reasons are given for their conclusion, the history of the case is not recited and no basis appears for the opinion that the injury was brought on by overwork; that hence they are of no probative value. In that connection reference is made to the rule of procedure adopted by the Industrial Accident Commission reading: "The physician's report should include the history of injury, the patient's complaints, the sources of all facts set forth in the history and complaints, that is, whether furnished by the patient or by some other person, the findings on examination, the opinion and reasons for such opinion. Such reasons should be set forth fully and in detail." (Rules of Practice and Procedure of Ind. Acc. Comm., rule XI, § 2.) No objection on the above grounds was made by the petitioner to reports of applicant's doctors, and no request or endeavor was made by them to cross-examine the doctors. Cacozza testified that both of those doctors were treating him; they were his attending physicians. The failure to object to the reports on the ground that they did not comply with the commission's rule bars petitioner from now raising that question. Moreover, the rule is phrased in terms making it directory rather than mandatory. While it may express the policy of the commission it does not necessarily preclude it from accepting a report which does not comply with its terms.

[10] The failure of the report to state the reason for the expert opinion does not strip it of probative value to the point where it is not substantial evidence supporting the decision of the commission. It goes to the weight of such evidence, a matter within the exclusive province of the commission as the arbiter of fact. Petitioners had the right to cross-examine the witnesses if they saw fit. But made no such request.

[11] Where an expert witness, such as a medical witness, bases his scientific opinion on his observation, such as an attending or treating physician observing his patient, he need not state the reasons for his opinion—the facts upon which they are based, to render his opinion competent and probative evidence. Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 P. 671; distinguishing People v. Le Doux, 155 Cal. 535, 102 P. 517 and Eisenmayer v. Leonardt, 148 Cal. 596, 84 P. 43; Thomason v. Hethcock, 7 Cal.App.2d 634, 46 P.2d 832; see Sheehan v. Board of Police Com'rs, 197 Cal. 70, 239 P. 844; Hoffman v. Southern Pac. Co., 101 Cal.App. 218, 281 P. 681; Wigmore on Evidence, 3d Ed., § 675; Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491, 136 A.L.R. 965. Petitioners cite Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P.2d 1071, for the proposition that an expert's opinion has no weight unless it is supported by the facts upon which it is predicated. But in those cases the expert was not the attending physician and it affirmatively appeared that the opinion had no basis. In the instant case, the doctors being the attending and treating physicians, it may be assumed they made observations and acquired sufficient facts as a basis for their reports. Petitioners did not avail themselves of the opportunity to cross-examine.

[12] Petitioners contend that they were denied due process of law, relying upon Morgan v. United States, 298 U.S. 468, 478, 56 S.Ct. 906, 80 L.Ed. 1288, for the proposition that the guarantee of due process requires that the one who determines the facts must consider the evidence and "The one who decides must hear." It is conceded that evidence may be taken by an examiner and sifted and analyzed by subordinates and the adjudicating body may base its determination on such analysis. See California Shipbuilding Corp. v. Industrial Acc. Comm., 27 Cal.2d 536, 165 P.2d 669.

In the instant case the record shows that the hearing referee made a report on August 24, 1945, after the hearing, in which he summarized the evidence. He referred to the treatment of the employee by Drs. Daley and Petter and mentions that time was given to file "further medical reports." On September 24, 1945, after all the medical reports were in, the hearing referee prepared and signed findings of fact and award stating that the injury consisting of cerebral apoplexy occurred in and arose out of the employment. Dated October 4, 1945, are findings and an award purportedly signed by the hearing referee and thereunder appearing "Industrial Accident Commission" and bearing the latter's seal.

[13-15] It is petitioners' contention that there is no showing that the commission acted upon and considered the case prior to the issuance of the above findings. The seal of the commission indicates a consideration by it. Moreover, there is no showing that the commission did not consider the case and authorize the affixation of its seal. In the absence of such a showing it must be presumed that official duty was performed (Code Civ.Proc. § 1963 (15) and hence that the commission acted upon and considered the case. See Pacific Indem. Co. v. Industrial Acc. Comm., 28 Cal. 2d 329, 170 P.2d 18; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798. It is true that the referee in his first report did not summarize the medical reports but they were on file with the commission when he made his suggested findings and when the findings and award were made and were presumably considered by him and the commission. We must so presume on the basis above stated. Petitioners refer to the investigation by a committee of the Legislature of the procedure before the commission and testimony there given indicating that the commission fails to really consider the evidence and cases but acts pro forma and perfunctorily. But those circumstances cannot control a specific case nor be a basis to support the serious charge that petitioners were denied due process of law in the instant case. It is true that: "Every finding, order, decision, or award made by any commission or referee, pursuant to such investigation, inquiry or hearing, when approved and confirmed by the commission and order filed in its office, is the finding, order, decision, or award of the commission." (Lab. Code, § 115.) But inasmuch as the seal of the commission was attached it will be presumed the commission approved the findings and award and ordered their filing.

[16, 17] Continuing with their argument with reference to a denial of due process, petitioners attack the denial by the commission of their petition for a rehearing. It is asserted that it was done in a closed session of the commission and the parties were not permitted to appear before it. As a general rule, due process of law does not require that provision for rehearings be made. See Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U.S. 421, 14 S.Ct. 1114, 38 L.Ed. 1031; Board of Education of San Francisco, Unified School Dist. v. Mulcahy, 50 Cal.App.2d 418, 123 P.2d 114. The statute provides that: "Upon filing of a petition for a rehearing, if the issues raised thereby have theretofore been adequately considered by the commission, it may determine the same by confirming without hearing its previous determination." (Lab.Code, § 5906.) Here the commission denied the rehearing. Although the rehearing referee (different from the hearing referee who heard the case) reviewed the case on the petition for rehearing and recommended granting, the commission had before it the report and findings of the hearing referee and medical reports and chose to let the award stand. There is no obligation on the part of the commission to accept a recommendation of a referee to grant a rehearing, and the law is satisfied when the commission weighs the hearing referee's report and the record against the rehearing referee's report and denies acceptance of the latter.

The award is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, J., did not participate herein.

29 Cal.2d 409

PUISSEGUR v. YARBROUGH et al.

L. A. 19359.

Supreme Court of California, in Bank.
Dec. 13, 1946.

1. Execution ⚷146(1)

Section 542b providing that an attachment or garnishment on personal property shall cease to be of any effect at the expiration of three years after issuance of writ does not postpone the time of the expiration of writ of execution beyond the one year period specified in Section 688. Code Civ.Proc. §§ 542b, 688.

2. Execution ⚷146(1)

Although an attachment against note and trust deed, if valid, was still in force when writ of execution was issued, but both the one year and three year statutory periods expired without any sale having been made under the execution, any rights which the attaching creditor may have had in the note and trust deed by virtue of the execution were terminated by operation of law. Code Civ.Proc. §§ 542b, 688.

3. Attachment ⚷177
Garnishment ⚷116

Attaching creditor obtains only a potential right or a contingent lien, and to discharge their liability on note secured by trust deed, makers who had been garnished by payee's creditor should have made all payments to the sheriff in accordance with statute, and payments to garnishing creditor, to whom the note and trust deed were later assigned, were made at maker's own risk. Code Civ.Proc. §§ 542b, 544, 688.

4. Execution ⚷115

Where the assignment of note and trust deed was subsequent to plaintiff's levy of execution on note and trust deed the assignee could not claim any greater rights by virtue of the transfer than the holder of the note and trust deed then had. Code Civ.Proc. §§ 542b, 688.

5. Execution ⚷132

In levying execution on note and trust deed in hands of bank for collection, it was not necessary to a valid lien for the sheriff, who made service of the writ on the bank in accordance with statute, to take possession of the note at the time of the levy. Code Civ.Proc. §§ 542b, 688.

6. Execution ⚷146(1)

Where writ of execution on note and trust deed in hands of bank for collection was returned by the sheriff as partially satisfied and four months later a second writ of execution was served at which time note was delivered to the sheriff and his certificate of sale recited that the sale was made under the second levy, purchaser's title to the note and trust deed was based on the lien established by the first levy, since the mere issuance of the second writ did not constitute an abandonment of the first levy and the title obtained did not depend upon the return to the writ as made by the sheriff. Code Civ.Proc. §§ 542b, 544, 688.

7. Execution ⚷115
Mortgages ⚷249(1)

Where assignment of note and trust deed was subsequent to plaintiff's levy of execution on note and trust deed, assignee took the assignment subject to plaintiff's rights, and the liability of the makers of note was not discharged by payments made to the assignee. Code Civ.Proc. §§ 542b, 544, 688.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Raymond F. Puissegur against F. Gramer Yarbrough and others to foreclose a trust deed as a mortgage. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, see 164 P.2d 42.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for appellants.

J. M. Clements, Thomas Higgins, Robert E. Austin and John N. Helmick, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

Defendants have appealed from a judgment foreclosing, as a mortgage, a deed of trust given by them to secure their note payable in monthly installments to Mrs. M. D. Woodd. Plaintiff, a judgment creditor of Mrs. Woodd, purchased the note and trust deed at a sheriff's sale made under a levy of execution on his judgment and thereafter brought this action claiming defendants were in default in the payment of certain installments. Defendants denied the default, asserting that they had paid the installments in question to one Hovey, and contending that Hovey was entitled thereto by virtue of an assignment of the note and trust deed from Woodd to Hovey.

Plaintiff's action against Mrs. Woodd was tried in February, 1940, but, due to delay caused by a motion made by Mrs. Woodd to reopen the case after submission, judgment was not rendered therein until April 26, 1940. Messrs. Heath and Knapp, attorneys for defendants herein, represented Mrs. Woodd in that action. They assigned to Hovey a claim which they had against Mrs. Woodd for legal services, and on April 11, 1940, Hovey sued Mrs. Woodd on this claim and served defendants with a writ of attachment and notice of garnishment in that action. At that time, the note was held by a bank for collection on behalf of Mrs. Woodd. On June 19, 1940, a writ of execution, issued on plaintiff's judgment against Mrs. Woodd, was served on the bank attaching all personal property belonging to Mrs. Woodd under the control of the bank. The next day the writ was served on defendants. Thereafter, on September 15, 1940, Mrs. Woodd, who had retained possession of the deed of trust, assigned it and the note to Hovey. Subsequently, on October 17, 1940, plaintiff purchased the note at the sheriff's sale made under a levy of execution on plaintiff's judgment against Mrs. Woodd. On July 8, 1941, a judgment was entered in Hovey's action against Mrs. Woodd, and a writ of execution, issued on August 5, 1942, was served on defendants, but no attempt was ever made pursuant to this levy to sell any interest of Mrs. Woodd in the note or trust deed.

Defendants apparently have chosen to rely upon the assignment of the note and trust deed by Mrs. Woodd to Hovey on September 15, 1940, rather than upon the Hovey attachment of April 11, 1940, in seeking to justify the payments made to Hovey. We must, nevertheless, consider the effect of the attachment before proceeding with a discussion of the assignment. It is unnecessary, however, to determine the validity of the levy of the attachment, concerning which there is some question because of the manner in which it was made, since it is clear from the record that any lien which Hovey may have obtained thereunder expired by lapse of time.

[1-3] Section 542b of the Code of Civil Procedure provides that "An attachment or garnishment on personal property * * * shall * * * cease to be of any force or effect * * * at the expiration of three years after the issuance of the writ of attachment * * *." This section does not postpone the time of the expiration of a writ of execution beyond the one-year period specified in section 688 which provides, with certain exceptions not material here, that no levy of execution "shall bind any property for a longer period than one year from the date of the issuance of the execution * * *." Jones v. Toland, 117 Cal.App. 481, 483, 4 P.2d 178. Although the Hovey attachment, if valid, was still in force when his writ of execution was issued, both the one year and three year periods expired without any sale having been made under the execution, and any rights which Hovey may have had in the note and trust deed by virtue of the garnishment and execution were terminated by operation of law. Jones & Son v. Independence Indem. Co., 52 Cal.App.2d 374, 378, 126 P.2d 463; Shaffer v. Noziglia, 64 Cal.App. 93, 96, 220 P. 431. The attaching creditor obtains only a potential right or a contingent lien (see 5 Am.Jur. 94; 3 Cal.Jur. 477) and in order to discharge their liability, defendants should have made all payments to the sheriff in accordance with section 544 of the Code of Civil Procedure. The statutory procedure is designed to protect all parties concerned until their rights are finally determined, and defendants acted at their own risk in making the payments to Hovey instead of to the sheriff.

[4, 5] The assignment of the note and trust deed by Mrs. Woodd to Hovey on September 15, 1940, was subsequent to plaintiff's levy of execution on June 19, 1940, and therefore it is clear that Hovey could not claim any greater rights by virtue of the transfer than Mrs. Woodd then had.

It is contended by defendants, however, that the service of the writ of execution did not create a lien because the sheriff did not take possession of the note. See Hoxie v. Bryant, 131 Cal. 85, 63 P. 153; Haulman v. Crumal, 13 Cal.App.2d 612, 57 P.2d 179. With respect to property in the possession of or under the control of a bank, whether capable of manual delivery or not, section 542, subdivision 6, of the Code of Civil Procedure provides that it shall be attached "by leaving a copy of the writ and the notice with the manager or other officer of such banking corporation * * * at the office or branch thereof * * * at which such banking corporation * * * has credits or other personal property belonging to the defendant in its possession or under its control." Property may be levied on under execution "in like manner as like property may be attached." (Code Civ.Proc. § 688.) In this case service was made on the bank in the manner prescribed by the statute and it was not necessary for the sheriff to take possession of the note at the time of the levy.

An analogous situation was presented in Partch v. Adams, 55 Cal.App.2d 1, 130 P.2d 244, where the sheriff in levying execution on shares of stock did not take them into his possession but made the levy by serving officers of the corporation, in the manner provided for attachments of shares of stock by subdivision 4 of section 542 of the Code of Civil Procedure. The court, citing section 688, held the execution valid, since the sheriff in making the levy had followed the procedure prescribed for the attachment of shares of stock.

[6] When the writ of execution was served on the bank on June 19, 1940, the bank acknowledged that it was holding the note for collection, and delivered to the sheriff $69.75 which it owed to Mrs. Woodd. The sheriff returned the writ as partially satisfied in that amount. On October 11, 1940, the bank was served with a second writ of execution, the note was delivered to the sheriff, and his certificate recites that the sale was made under the second levy. Defendant contends that the lien of the first levy was extinguished by the return of the writ partially satisfied, and that plaintiff's title is derived from the second levy of execution on October 11, 1940, which was subsequent to the assignment from Mrs. Woodd to Hovey. The lien of the first levy was not lost, however, merely because the sheriff's first return made no reference to the note. The title which plaintiff obtained at the execution sale did not depend upon the return to the writ as made by the sheriff, nor upon the sheriff's opinion as to the source of his authority to make the sale, Weldon v. Rogers, 157 Cal. 410, 413, 108 P. 266; Hunt v. Loucks, 38 Cal. 372, 382, 99 Am.Dec. 404; Wilson v. Madison, 55 Cal. 5, 8. The mere issuance of the second writ of execution did not constitute an abandonment of the first levy, and plaintiff is entitled to the priority of the lien established thereby. Partch v. Adams, 55 Cal.App.2d 1, 130 P.2d 244; Weldon v. Rogers, supra.

[7] Hovey took the assignment from Mrs. Woodd subject to plaintiff's rights and therefore defendants were in default, as their liability for installments was not discharged by the payments made to Hovey.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

29 Cal.2d 525

Ex parte MARLEY.

Cr. 4748.

Supreme Court of California, in Bank.
Dec. 24, 1946.

1. Criminal law 🔑62

Generally in absence of statutes, a master or principal, before he can be held criminally responsible for the act of any employee or agent, must be proved to have knowingly and intentionally aided, advised, or encouraged the criminal act.

2. Weights and measures 🔑6

Statute penalizing as misdemeanor every person who by himself or his employee or agent sells any commodity at short weight or measure, authorized conviction of proprietor of meat market, whose clerk sold meat that weighed less than amount charged for, though proprietor was not present at the time. Business and Professions Code, § 12023.

3. Constitutional law ⚷250, 266

In prosecution of proprietor of meat market whose clerk made short weight sale in proprietor's absence, proprietor was not denied due process and equal protection of the laws when denied permission to prove that he came within statutes respecting persons capable of committing crimes. Business and Professions Code, § 12023; Pen.Code, § 26, subds. 4, 6.

4. Weights and measures ⚷2

Statute providing that every person who by himself or his employee or agent sells any commodity, at short weight or measure, is guilty of a misdemeanor, did not invade constitutional right of proprietor of meat market whose clerk made short weight sale in proprietor's absence. Business and Professions Code, § 12023.

5. Habeas corpus ⚷25(1)

The seemingly disproportionate severity of penalty assessed by trial judge against proprietor of meat market whose clerk made short weight sale of meat in proprietor's absence as compared to that meted out against clerk, did not constitute a legal basis for intervention of Supreme Court by habeas corpus. Business and Professions Code, § 12023.

CARTER, J., dissenting.

Habeas corpus proceeding by Clay Marley to secure his release from custody.

Writ of habeas corpus discharged and petitioner remanded to custody.

L. M. Cahill and Hiram T. Kellogg, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SCHAUER, Justice.

Petitioner, the proprietor of a meat market, was convicted of a violation of section 12023 of the Business and Professions Code, and sentenced to ninety days in the county jail. The mentioned section provides as follows: "Every person who by himself or his employee or agent, or as the employee or agent of another, sells any commodity, at, by, or according to gross weight or measure, or at, by, as, of, or according to any weight, measure or count which is greater than the true net weight, * * * is guilty of a misdemeanor." Petitioner seeks release through habeas corpus on the ground that the quoted statute is unconstitutional as it is sought to be applied to the facts here shown. With this position we are compelled to disagree.

The record discloses that on or about March 22, 1945, an employee of the Office of Price Administration, named Mrs. Punteney, accompanied openly by one other woman (named Mrs. Sampson) and surreptitiously by two men (one of them named Delaney, all of the same calling, appeared at the counter of petitioner's meat market in Los Angeles County and requested of petitioner's clerk and employe, one Dennis, that the latter sell her one veal steak and four or five lamb chops. Dennis weighed the selections, told Mrs. Punteney and Mrs. Sampson the respective prices, and wrapped the meat. Mrs. Punteney then showed Dennis her "identification" and summoned Delaney "who was waiting outside the door," and together they checked the weight of the meat, which was found to be less than that which would correspond, according to Office of Price Administration price charts posted in the market, to the prices charged. About two weeks later Delaney signed the complaint upon which petitioner's conviction is based. Dennis was also named as a defendant was convicted, and was penalized by a $100 fine. It is undisputed that petitioner did not participate personally in the transaction here involved, was absent from the premises at the time it occurred, and had at no time instructed Dennis to give short weight.

[1] The general rule of law as repeatedly enunciated and emphasized by the courts

of California and of other jurisdictions in that a master or principal before he can be held criminally responsible for the act of an employe or agent must be proved to have "Knowingly and intentionally aided, advised, or encouraged the criminal act." (See People v. Doble (1928), 203 Cal. 510, 515, 265 P. 184, 187; United States v. Food and Grocery Bureau of Southern California (1942), D.C., 43 F.Supp. 966, 971.) Thus, in People v. Green (1913), 22 Cal.App. 45, 50, 133 P. 334, cited and followed in the Doble case, the court declared that "Before one can be convicted of a crime by reason of the acts of his agent a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. 1 McLain on Criminal Law, § 188. While false pretenses may be made to an agent of the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act, will not be presumed. 1 McClain on Criminal Law, § 683." The same salutary principle was reiterated in People v. Armentrout (1931) 118 Cal.App. (Supp.) 761, 762, 1 P.2d 556, and in People v. Jarvis (1933), 135 Cal.App. 288, 294, 27 P.2d 77, and, possessing the attributes of natural justice, is firmly entrenched in our jurisprudence. Other statements of the rule appear at pages 559–561 of 4 California Jurisprudence 10 Year Supplement; and also 150 of 22 C.J.S., Criminal Law, § 84, at page 149, wherein it is pointed out that "The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority * * * has no application to criminal law since in order to render a person criminally liable it is essential that he have the requisite criminal intent at the time that the supposed criminal act was committed. In other words, specific intent cannot be imputed to a person through an agent, without, the principal's direct participation in the criminal act. Similarly, it has been held that as regards criminal liability for participation in a crime the relation of master and servant is not recognized. Therefore, the mere relation of principal and agent or of master and servant does not render the principal or master criminally liable for the acts of his agent or servant, although done in the course of his employment; it must be shown that they were directed or authorized by him, and a master is not criminally liable for acts of his servant done without the knowledge or consent of the master and in a place not under his control."

In limited qualification of the general rule, however, legislative bodies in California as well as in other jurisdictions have adopted various statutes positively forbidding certain acts and imposing criminal liability upon the master if the act is knowingly performed by his servant within the scope of the latter's authority. (See 43 L.R.A.,N.S. 11–37.) Such statutes have dealt with the sale of intoxicating liquor (People v. Pera (1918), 36 Cal.App. 292, 304, 171 P. 1091); of pure foods and drugs (People v. Schwartz (1937) 28 Cal.App.2d Supp. 775, 70 P.2d 1017; In re Casperson (1945, 69 Cal.App.2d 441, 159 P.2d 88); and with the operating of gaming establishments and of saloons, and have been upheld by the courts (See 43 L.R.A.,N.S. 11–37; cf. 35 Am.Jur. 1042–1043, § 602; 115 A.L.R. 1226–1236; 28 A.L.R. 1382–1394). Other instances in which criminal responsibility has been imposed despite lack of specific knowledge, direction or encouragement by the employer of the criminal act on the part of the servant are listed in Commonwealth v. Mixer, (1910), 207 Mass. 141, 93 N.E. 249, 31 L.R.A.,N.S., 467, 468, 20 Ann. Cas. 1152. Examples are the driving of an unregistered automobile (Feeley v. City of Melrose (1910), 205 Mass. 329, 334, 91 N.E. 306, 27 L.R.A.,N.S., 1156, 137 Am.St.Rep. 445; being present where gaming implements are found (Commonwealth v. Smith (1896), 166 Mass. 370, 44 N.E. 503); obstructing a highway (Commonwealth v. New York Central & Hudson River Railroad (1909), 202 Mass. 394, 88 N.E. 764, 23 L.R.A.,N.S., 350, 132 Am.St.Rep. 507, 16 Ann.Cas. 587); being present where implements for smoking opium are found (Commonwealth v. Kane (1899), 173 Mass. 477, 53 N.E. 919); and the killing for sale of an animal under a designated age (Commonwealth v. Raymond (1867), 97 Mass. 567).

Such exceptions are also recognized in the statement of the prevailing principles in 22 C.J.S., Criminal Law, § 84, at page 150, supra, by the observation that "Under statutes positively forbidding certain acts irrespective of the motive or intent of the actor, a principal or master may be criminally liable for his agent's or employee's act done within the scope of his employment * * *."

[2] And in the field of weights and measures, the rule is, as stated in 68 Corpus Juris 165-166, sections 24, 25, that where, as here, the statute provides that "whoever, himself or by a servant or agent, is guilty of giving false or insufficient weight or measure shall be punishable, evidence of giving short weight by defendant's servant in his absence warrants a conviction of defendant. * * * [W]here qualifying words such as knowingly, intentionally, or fraudulently are omitted from provisions creating the offense it is held that guilty knowledge and intent are not elements of the offense. * * * These statutes make the seller the guarantor of the weight and quantity of the commodity sold without regard to his intent or knowledge." Cases in which the stated rule has been applied are People v. Beggs (1945), 69 Cal.App.2d Supp. 819, 160 P.2d 600; Commonwealth v. Sacks (1913), 214 Mass. 72, 100 N.E. 1019, 43 L.R.A.,N.S., 1, Ann.Cas.1914B, 1076; Smith v. State (1931), 223 Ala. 346, 136 So. 270; State v. Weisberg (1943), 74 Ohio App. 91, 55 N.E.2d 870, 872; Great Atlantic & Pacific Tea Co. v. District of Columbia (1937), App.D.C., 89 F.2d 502. The principle upon which such holdings are based is expressed as follows in State v. Weisberg (1943), supra, at page 95 of 74 Ohio App., at page 872 of 55 N.E.2d: "There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.

"In these cases it is the duty of the defendant to know what the facts are that are involved or result from his acts or conduct. Statutes punishing the sale of adulterated foods or prohibiting the sale of intoxicating liquor to minors are most frequently found in this class of cases. The use of false weights could well come within this field of the law."

In the Beggs case, supra, 69 Cal.2d Supp. 819, 160 P.2d 600, the defendants had, in violation of section 26510 of the Health and Safety Code, sold sacks of onions which they represented to be of the weight stated on the respective labels of such sacks which defendants themselves had purchased but which actually, without defendants' knowledge, weighed less. Judge Bishop, authoring the opinion for the Appellate Department of the Superior Court, applied and followed the stated exception to the general rule (requiring intent as a prerequisite to criminal liability) and in so doing observed (at page 822, of 69 Cal. App.2d Supp., at page 601 of 160 P.2d) that "Neither knowledge nor an intent to defraud is made a condition of the statute, with the result that the act of selling misbranded goods constitutes the offense, though done, as it doubtless was in the case before us, both in happy ignorance of the fact that the legend on the sacks was incorrect and without any intention of defrauding anyone. This conclusion is supported by cases analogous to ours, decided in this state [Citations]."

[3] Petitioner complains that he was denied due process and the equal protection of the laws in that he was not permitted to prove that he came within the provisions of subdivisions 4 and 6 of section 26 of the Penal Code. Such provisions are, in material part, as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Four. Persons who committed the act * * * under an ignorance or mistake of fact, which disproves any criminal intent * * * Six. Persons who committed the act * * * through misfortune or by ac-

cident, when it appears that there was no evil design, intention, or culpable negligence." Without any implication as to the legal propriety of his claim, as such, it is to be noted that the petitioner was properly allowed to introduce evidence tending to show that the prohibited act (the short weight element of the sale) was committed by the clerk by accident or mistake of fact, but on this issue the finding was adverse to the two defendants. The facts that petitioner was not present when the short weight sales were made and that he had not instructed the clerk to sell short weight, do not bring petitioner within the code provisions above quoted. He shows no other evidence or offer of evidence to that end. Whether some hypothetical situation (such, for example, as a conspiracy by a clerk with others deliberately to injure an employer) not shown by the record here, might properly be shown and be held to bring an employer within the purview of the code provisions, we do not, upon this application for habeas corpus, in the light of the record, have occasion to determine.

[4, 5] Inasmuch as the Legislature of this state has seen fit, in the exercise of its power, to impose upon petitioner criminal liability for the offense which was committed by his employe, we cannot, in the light of the authorities above cited, hold that the statute as written, or as applied here, invades a constitutional right of the petitioner. The seemingly (upon the record before us) disproportionate severity of the penalty assessed by the trial judge against this petitioner, as compared to that meted out against his codefendant, who was the primary actor, does not constitute a legal basis for intervention by habeas corpus. The writ of habeas corpus heretofore issued is discharged and petitioner is remanded to custody.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice.

I dissent. Broadly speaking this case brings into sharp focus the clash between conflicting social philosophies which are reflected in the interpretation of constitutional and statutory provisions. That is, should the burden be placed upon an innocent and blameless employer, engaged in a business not in itself harmful to the public, of risking conviction of a crime and service of a jail sentence because of the mistake, intentional or not, of his employee? The majority opinion answers this question in the affirmative. With this conclusion I cannot agree. In my opinion there are no considerations of public policy or general welfare which warrant such a departure from the long established rule that criminal intent is a necessary element of a crime. Various situations can be imagined which render intolerable, and shocking to one's sense of justice, the construction placed by the majority opinion on the statute here involved. Similar statutes could be passed relating to the sale of railroad tickets or the cashing of checks which would make criminally liable the officers of a railway or banking corporation for an error made by an employee in overcharging a customer for a ticket or short changing a customer in the cashing of a check. Upon the occurrence of such an event in a remote section of the state where the railroad or bank was operating, the president and other officers of the railroad or bank who might reside in a metropolitan area hundreds of miles from the place where the crime was committed could be arrested and sent to jail for an alleged violation committed by a ticket clerk or bank teller. Likewise a merchant, who had been inducted into military service and who left his business in charge of a manager, could be sent to jail for violation of such a statute committed during his absence in military service when he had no knowledge whatever of what was taking place in his place of business. In such a case there is nothing an employer can do to protect himself, as the act of the employee is one which depends entirely upon use of his own faculties and senses and it is impossible for the employer to determine with any degree of accuracy whether the faculties and senses of the employee are functioning properly and accurately during all his working hours. These considerations, in my opinion, outweigh any benefit or advantage which may be gained to the public by an interpretation of a statute which places upon an innocent and blameless employer criminal responsibility for an act of his employee.

The specific issue here involved is the correct construction of section 12023 of the Business and Professions Code quoted in the majority opinion. Should it be construed to mean (1) that the master or principal (petitioner here) is criminally liable thereunder even though he is wholly innocent of fault or blame—did not authorize, assent to, direct or acquiesce in the act of his employee, or (2) that he shall not be denounced a criminal unless he authorized, assented to, directed or acquiesced in the unlawful act of his employee?

It is clear that the section is reasonably susceptible of the second construction; it certainly is at least equally amenable to either the first or the second interpretation. The statute condemns unlawful action of a principal by his agent. In other words, the unlawful action of the agent must be authorized specifically not generally under the broad authority to sell his principal's merchandise. It will be remembered that the statute condemns the unlawful act by oneself or by agent. "By oneself" means "alone" "unaided." (Webster's New Int. Dict., p. 367.) That expression followed by "or by an agent" must indicate that in the latter case the principal is acting not alone. He has procured and had the aid of his employee. They are acting together—in concert. He is still the one who must commit the unlawful act before he is guilty but he has assistance, that is, he instructs his agents to physically commit the act denounced. But even if the scales hang equally the second construction is compelled by numerous factors.

In a comprehensive discussion of the law with respect to criminal liability without fault Professor Francis Bowes Sayre, in suggesting tests for the construction of statutes purporting to impose such liability, says: "How then can one determine practically which offenses do and which do not require mens rea, where the statute creating the offense is entirely silent as to requisite knowledge? Although no hard and fast lines can be drawn, two cardinal principles stand out upon which the determination must turn.

"The first relates to the character of the offense. All criminal enactments in a sense serve the double purpose of singling out wrongdoers for the purpose of punishment or correction and of regulating the social order. But often the importance of the one far outweighs the other. Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring mens rea; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent.

"The second criterion depends upon the possible penalty. If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent." (33 Col.L.Rev. 55, 72.) In the instant case a violation of the statute is a misdemeanor. (Bus. & Prof. Code, § 12023, supra.) And a misdemeanor is punishable by a fine not exceeding $500 or by imprisonment in the county jail not exceeding six months, or by both (Pen. Code, § 19).

This court has recently given consideration to a similar problem in the cases involving a statute declaring the forfeiture of a motor vehicle "Used to unlawfully transport any narcotic." (Health & Saf. Code, § 11610.) In People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641, this court speaking of the use of the car to carry narcotics without the owner's consent states (at page 506 of 26 Cal.2d, at page 642 of 159 P.2d): "It is true that the Health and Safety Code *does not expressly exempt from confiscation an automobile taken in the first instance without the owner's consent* and used to transport narcotics but *it has been construed as not authorizing forfeiture under such circumstances. The reasoning leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property* *without due process of law* (People v. One 1937 Plymouth 6, [4-Door Sedan,] supra, 37 Cal.App.2d 65, 98 P.2d 750), and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation. Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 326, 327, 109 P.2d 935." [Emphasis added.] People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719, concerned the possession, unknown to the car owner, of narcotics in the vehicle by a guest of the owner and operator of the car. The trial court's judgment of forfeiture was reversed. (See, also, People v. Gory, 28 Cal.2d 450, 170 P.2d 433.)

There are cases involving various statutes where the innocent employer is held criminally liable for the acts of his employee. (See 43 L.R.A.,N.S., 11; 33 Col.L.Rev. 55, 84.) Where an employee sells liquor to a minor he is making the very decision that he has been employed to make, that is, deciding when he should sell and whether a particular customer is a minor. The employer in effect confers upon him the authority to violate or not violate the law in selling the liquor. But it is not to be supposed that the employer would authorize the employee to give short of the correct weight in the sale of merchandise. In the pure and adulterated food cases the employer has possession and control of the merchandise and is not asked to warrant at his peril the integrity of an employee.

Habeas corpus is the appropriate remedy in the instant case. In discussing the availability of habeas corpus to test the constitutionality of a statute this Court has said: " 'It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. * * * the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' * * * There are other situations in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate. Thus, it lies to test whether there is probable cause to justify the committing magistrate in holding petitioner for trial. * * * It also lies to test whether the complaint charges a public offense * * * even though this question falls within the jurisdiction of the trial court and may be raised on appeal." (In re Bell, 19 Cal.2d 488, 493, 122 P.2d 22, 26.) Where a person is imprisoned by virtue of an erroneous construction of a criminal statute or for acts not constituting a crime, he should be released on habeas corpus. (See In re Corryell, 22 Cal. 178; Ex parte Kearny, 55 Cal. 212; 39 C.J.S., Habeas Corpus, § 17, at page 457.) This does not mean that every error at law is a basis for the writ. However the correct interpretation of the criminal statutes is, like the issue of constitutionality, of great public importance in view of its widespread significance and its bearing upon not only the case under consideration but other cases.

In my opinion the petitioner should be discharged from custody.

29 Cal.2d 503

PARKER et al. v. SHELL OIL CO.

S. F. 17309.

Supreme Court of California, in Bank.

Dec. 23, 1946.

As Modified on Denial of Rehearing

Jan. 20, 1947.

1. Account, action on 🔑3

A "mutual, open, current account" must consist of reciprocal demands in order to recover thereon, and existence of debts which could be subject of set-off is insufficient to constitute mutual account, but there must be an understanding either express or implied from nature of parties' dealings, that charges on each side are to extinguish pro tanto those on other side, so that only one indivisible liability, arising from series of transactions, exists.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual Account".

2. Account, action on ⚷3
Limitation of actions ⚷60(2)

Sums due under express contract, such as rent under a lease, are not ordinarily treated by parties as items of open account and, if they are not so considered by them, one party cannot evade bar of statute of limitations by pleading open, mutual, current account or book account. Code Civ. Proc. § 337, subds. 1, 2, § 339, subd. 1, § 344.

3. Account, action on ⚷3

Rent may become an item in open account by parties' mutual understanding, in which case, cause of action therefor is on account, not under lease.

4. Account, action on ⚷4

Settlement of some disputed items of open, mutual, current account or payment by one party thereto of amount of certain charges against him will not destroy account.

5. Appeal and error ⚷1071(6)
Trial ⚷397(1)

In action against oil company for rent due under lease of plaintiffs' filling stations to defendant and amount due on alleged mutual, open, current account for commissions on sales of defendant's gasoline by plaintiffs as defendant's sublessees and agents, whether such account existed and whether rent was an item therein were fact issues for trial court, so as to require reversal of judgment for defendant, in absence of direct finding as to whether such account ever existed or any finding as to whether rent charges became part of account.

6. Appeal and error ⚷1071(6)

The trial court's failure to find on all material issues raised by pleadings and evidence is ground for reversal of judgment, unless such findings were waived.

7. Trial ⚷397(5)

Where cause is at issue on defendant's denial of allegations of common count, trial court's finding in language of such count ordinarily concludes whole controversy, and specific findings are unnecessary.

8. Account, action on ⚷3

A mutual, open, current account, as distinguished from book account, which must be written in a book, need not be kept in any particular form, which of parties thereto keeps account is immaterial, and written entry of various charges on account is unnecessary.

9. Appeal and error ⚷197(3)

A defendant, not moving before trial to exclude, nor objecting at trial to introduction of evidence of both parties' demands on ground that they were not set forth in plaintiffs' bill of particulars, cannot complain of admission of such evidence on plaintiffs' appeal from judgment for defendant.

10. Appeal and error ⚷192(4)

Defendant, not objecting to introduction of evidence of mutual account sued on, cannot object, on plaintiffs' appeal from judgment for defendant, that plaintiffs' bill of particulars did not set forth mutual account.

11. Trial ⚷396(6)

In action on alleged open, mutual, current account for rent due under service station lease and commissions on plaintiffs' sales of defendant's gasoline, trial court's finding that lease and consignment contract provided that plaintiffs waived claims as to quantity, quality, prices, commissions, etc., unless made in writing within 48 hours after deliveries and that no written claims were made, did not sustain judgment for defendant, where parties did not construe such provision as governing controlling issue whether rent was included in account and court did not base decision on such finding.

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Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Ben Parker and others against the Shell Oil Company for rent due under a service station lease and moneys due on an open, mutual, current account as commissions for sale of defendant's gasoline by plaintiffs. Judgment for defendant and plaintiffs appeal.

Reversed and remanded for a new trial.

Prior opinion, Cal.App., 165 P.2d 38.

Bernal & Bernal and Edward E. Craig, both of Berkeley, for appellants.

McCutchen, Thomas Matthew, Griffiths & Greene, of San Francisco, and Sherrill Halbert, of Modesto, for respondent.

SCHAUER, Justice.

On June 7, 1940, plaintiffs instituted this action to recover moneys which allegedly became due to them from defendant oil company during the period from January 15, 1932, to August 1, 1936, while plaintiffs as lessors, sublessees, and agents of defendant operated a Shell service station. Their complaint alleges as a first cause of action that the sum of $3,259.02 is due as the unpaid balance of rent under the terms of plaintiffs' lease of their service station to defendant, and as a "Second Cause of Action" that defendant became indebted to plaintiffs in the sum of $3,259.02 on an open, mutual, current account. At a prior (the first) trial of this action it appeared that the first cause of action was barred by the statute of limitations except as to rental accruing after June 7, 1936 (Code Civ. Proc., § 337, subd. 1). Defendant stipulated that judgment could be entered against it for rent which became due within four years of the date of filing the complaint. For reasons not here material the trial court refused to admit documentary evidence offered by plaintiffs in support of the "Second Cause of Action." Judgment was against plaintiffs on such "Second Cause of Action." Plaintiffs appealed. (Parker v. Shell Oil Co. (1942), 55 Cal. App.2d 48, 130 P.2d 158.) The District Court of Appeal held that the evidence should have been admitted and reversed the judgment. On that prior appeal defendant contended (at page 55 of 55 Cal.App. 2d, at page 162 of 130 P.2d) that "No prejudice to appellants occurred because the offered documents, as a matter of law, would not constitute an open, mutual, and current account." The District Court of Appeal said, "This contention is predicated on the argument that the account pleaded in the second count is based on the lease pleaded in the first, and that the law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of pleading that claim as an open account. That is undoubtedly the law. [Citations which concern book accounts; the same principle applies to open, mutual, current accounts.] If the proffered evidence should show that appellants' second cause of action is for the rent due under the lease pleaded in the first, these cases would be authority for the proposition that no open account, as required by section 337, subdivision 2, of the Code of Civil Procedure,[*] existed. But the record does not show that."

The second trial resulted in a judgment against plaintiffs as to each alleged cause of action. Plaintiffs again appeal. Before the second trial they amended their first alleged cause of action to aver that by oral agreement the lease was extended to another service station of plaintiffs. Defendant's answer, among other things, as to each alleged cause of action, sets up the defense of the statute of frauds and pleads the bar of the statute of limitations (both Code Civ.Proc. § 339, subd. 1 [oral agreement, two years], and id., § 337, subd. 1 [written agreement, four years].) The statute of limitations applicable upon the theory of the alleged "Second Cause of Action" (id., § 337, subd. 2) is not pleaded.

Upon the second trial the issues raised by the special defenses were first tried before a jury. The evidence as to whether the pleading of a mutual account was but an effort to disguise the first alleged cause of action was conflicting. In answer to a special interrogatory the jury found that the "second cause of action * * * [is not] based solely upon the rent due under the lease pleaded in the first cause of action." The trial continued without a jury.

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[*] Subdivision 2 of section 337 of the Code of Civil Procedure provides that an action to recover the balance due upon a mutual, open, current account must be commenced within four years from the date the cause of action accrues. Section 344 of the same code provides that a cause of action upon a mutual, open, current account "Is deemed to have accrued from the time of the last item proved in the account on either side."

The court heard further conflicting evidence and during the course of the trial ruled that there was a mutual, open, current account between the parties but that the rent was not included in such account. But, as hereinafter delineated, the latter ruling was not made as a finding of fact upon conflicting evidence, but rather was based upon an inapplicable principle of law, and there are no findings as to the most vital issues, to which the greater part of the evidence was directed. In this state of the record, the judgment cannot be upheld.

[1-3] Plaintiffs' right to recover upon their alleged second cause of action (they do not contend that the judgment is erroneous insofar as the theory of their alleged first cause of action is concerned) is governed by the following general principles: A mutual, open, current account must consist of reciprocal demands. It is not enough, to constitute a mutual account, that there exist debts which could be the subject of setoff; there must be an understanding, express or implied from the nature of the dealings between the parties, that charges on each side are to extinguish pro tanto those on the other side, so that there exists but one, indivisible liability arising from the series of transactions. (Norton v. Larco (1866), 30 Cal. 126, 130, 89 Am.Dec. 70; Millet v. Bradbury (1895), 109 Cal. 170, 174, 41 P. 865; O'Neill v. O'Neill (1920), 45 Cal.App. 772, 775, 188 P. 603; Dyer v. Minturn (1920), 47 Cal. App. 1, 4, 189 P. 1046; 1 Cal.Jur., pp. 143-144; 1 A.L.R. 1057, 1065; 39 A.L.R. 365, 370; 57 A.L.R. 196, 203.) Sums which become due under an express contract (such as rent under a lease) are not ordinarily treated by the parties as items of an open account. Hopkins v. Orcutt (1876), 51 Cal. 537, 538; Connor Live Stock Co. v. Fisher (1927), 32 Ariz. 80, 255 P. 996, 57 A.L.R. 196, 199.) If they are not so considered by the parties, one party cannot evade the bar of the statute of limitations by pleading an open, mutual, current account or book account. (Parker v. Shell Oil Co. (1942), supra, 55 Cal.App.2d 48, 55, 130 P.2d 158.) However, rent may by mutual understanding of the parties become an item in an open account; in such a case the cause of action is upon the account, not under the lease. (Gardner v. Rutherford (1943), 57 Cal.App.2d 874, 886, 136 P.2d 48, and cases there cited.)

So far as it is material here, the arrangement under which plaintiffs operated the Shell service station for defendant was found by the trial court to be as follows: On January 15, 1932, the parties entered into a written "Service Station Lease" by which plaintiffs leased to defendant a described service station; defendant agreed to pay as rent a sum equal to one cent for each gallon of gasoline delivered by defendant to, and sold from, the premises; the rent was "payable in cash or by credit as and when said gasoline was sold or on the 20th day of the calendar month next following the month for which the payment was to be made, as defendant might from time to time elect"; the lease was for a three-year term and thereafter from year to year until terminated by notice by either party; "said lease was not terminated by either party until after the 1st day of August, 1936." As part of the same transaction the parties, on January 15, 1932, entered into a written "Lease and Consignment Contract" by which defendant, for the term of the above lease, subleased the premises to plaintiffs at a rent of one dollar monthly; plaintiffs were appointed defendant's agents to sell defendant's gasoline delivered by it to the leased premises and to handle defendant's products exclusively; defendant agreed to pay plaintiffs a commission for each gallon of gasoline delivered by defendant and sold by plaintiffs. In March, 1933, plaintiffs acquired another service station and the parties orally agreed that the January 15, 1932, lease should be amended to cover both stations, "on condition that plaintiffs would use defendant's products exclusively" at their new station. Between January 15, 1932, and August 1, 1936, defendant delivered to plaintiffs 490,195 gallons of gasoline.

As previously stated, the evidence as to whether the one cent per gallon rental was understood to be a charge against defendant in a mutual account is conflicting. The very nature of the relation between the parties tends to show that it was. The rent was not in a stated amount payable at stated intervals; it was entirely dependent upon the amount of gasoline delivered by defendant to the premises. The ascertainment of the amount of rent accruing to plaintiffs from defendant during any accounting period (and of the amount due from plaintiffs to defendant for the price of gasoline, and of the amount due from defendant to plaintiffs as commissions) required the keeping of a record showing the amount of gasoline delivered. The lease itself indicates that the parties contemplated that the rent might become an item in a mutual account: it provided that the rent was payable "in cash or *by credit* * * * as defendant might from time to time elect." (Italics added.) Defendant did not pay the rent in the manner provided in the lease. It made several cash payments of rent at irregular intervals, then refused either to pay by cash or to give plaintiffs credit by including the rent in the mutual account. From these matters it would prima facie appear that the parties contemplated that there would be a mutual account with demands of defendant against which the rent could be credited and that, since defendant did not perform by paying cash, the rent *by operation of the express provision of the lease* became a credit to plaintiff whether or not defendant entered it as such in its records.

Plaintiffs introduced in evidence papers evidencing their alleged account: the above mentioned "Service Station Lease" and "Lease and Consignment Contract," and a valise which contains invoices, receipts, and monthly statements prepared by defendant and delivered to plaintiffs. From the papers in the valise it appears that there was a mutual account between the parties; the reciprocal demands included such items, for example, as charges against defendant based on "credit coupons" collected by plaintiffs from retail purchasers of defendant's products, and charges against plaintiffs for dealer's prices of defendant's products bought by plaintiffs. From these papers it further appears that defendant, in making up its monthly statements, did not credit plaintiffs (at least on those statements) with the one cent per gallon rent or with commissions, and did not credit itself with the one dollar per month rental provided for in the "Lease and Consignment Contract."

Plaintiff Della Parker gave the following seemingly conflicting testimony as to what general types of items were included in the account sued upon by plaintiffs:

"Q. * * * Will you tell me what items make up your open mutual and current account? * * * A. The products that I had bought from them. The invoices show that the———gas of different varieties and different accounts [sic] that I had bought from them. * * *

"Q. Well, do you contend that the Shell Oil Company owes you any money for any oil or any solvents or anything of that sort that you handled? A. No. We had settlements of all of those things. * * * [The alleged indebtedness] is for gas that was bought on those invoices that went through the pumps. * * *

"Q. What did you figure in on that account when you were figuring it up, as you say? A. Well, I had figured up the invoices and took off what they had paid me and what they didn't pay and found the balance. * * *

"Q. Are you talking about gallonage invoices? A. Not only———no, for everything. I have invoices for everything I ever bought off of them. * * * I segregated all my accounts and the oils and the by-products and the gasoline by itself. * * * And the things that they had paid me for were set aside and what they hadn't paid me, I set that down and I figured up my gallons, as I said, and took what they had paid me from what I figured the one cent.

"Q. After you got the total gas what did you do next? A. Well, I took my ———all I could remember of the money they had paid me and I wasn't quite sure that I had all the checks, remembered all the checks that they had paid me——— and just subtracted it from the difference. * * *

"Q. Now, Mrs. Parker, name some of the things that went into making up this account besides gasoline? A. Well, there is the lease and there is the rental.

"Q. All right, and what rental is that, the $1.00 per month? A. The $1.00 per month. * * *

"Q. What are the items of the account between you and the Shell Oil Company? A. Of all the products that I had purchased from them during the period of time that I handled their products.

"Q. I see, and was this one cent a gallon rental a portion of that account? A. Yes. * * *

"Q. Mrs. Parker, do you contend that there now remains unpaid any item in this account other than the rent item? * * * A. No——that is what I am suing for.

"Q. And that is all, is it not? A. That is right.

"Q. So far as the kerosene and the oil and the cleaning fluid and the gasoline and all those items are concerned, those have been settled between you and the Shell Oil Company? A. Yes, sir."

[4] (Of course, if there was an open, mutual, current account which included rent and other items, a settlement of some disputed items or a payment by one party of a sum corresponding in amount to certain charges against him would not destroy the account. For example, in Mercantile Trust Co. of San Francisco v. Doe (1914), 26 Cal.App. 246, 251, 146 P. 692, defendant made two payments which exactly corresponded in amount to the first two charges against him in an open book account. The District Court of Appeal held that this did not compel the inference that each charge was a separate item or destroy the openness and continuity of the account. And in Brown & Manzanares Co. v. Gise (1907), 14 N.M. 282, 285, 91 P. 716, the parties to an open, mutual, current account at the end of each fiscal year stated the account, then continued their dealings. The New Mexico Supreme Court held, relying upon cases from other states, that the balance due on account stated simply became an item in the succeeding open, mutual, current account.)

At the close of evidence the trial court stated that the items shown on the papers in the valise (including "the kerosene and the oil and the cleaning fluid and the gasoline" which Mrs. Parker testified "have been settled"), and such items alone, are included in an open, mutual, current account between the parties. At the request of the trial court accountants for each party prepared an "Account * * * compiled from documents contained in Plaintiffs' Exhibit 3 [the valise]." The compilation prepared by plaintiffs' accountant includes a credit to plaintiffs for the one cent per gallon rent, a credit which does not appear solely from the papers in the valise. Such compilation depends upon those papers to show the gallonage of gasoline delivered and upon the lease to show the agreement to pay one cent a gallon as rent. (The lease further shows, it will be remembered, the agreement to enter the rent as a "credit" to plaintiffs if not paid in cash by defendant at stated intervals.) Defendant conceded the correctness of plaintiffs' computation except insofar as it includes this credit. The trial court reiterated its ruling that "I am not going to allow the rent." The computation, not allowing credit to plaintiffs for rent, shows a balance due to defendant, which it does not seek to recover.

[5, 6] However, the findings do not meet the issues presented by the pleadings and at the trial. There is no finding that defendant ever paid any rent. There is a finding that it paid "a sum in excess of $1,642.93 on account of the sums due under the terms of said Service Station Lease and said Lease and Consignment Contract," but there is no finding as to how much the sum paid exceeded $1,642.93 or whether it was paid as rent, commission, or on account of any other particular claim. There is no finding that defendant ever credited any rent to plaintiffs, as the lease provided it should do if it did not pay the rent in cash. If (as found by the court) defendant promised to pay to plaintiffs as rent one cent per gallon of gasoline delivered, and if (as found by the court) defendant delivered 490,195 gallons of gasoline, then, assuming that defendant

paid $1,642.94 as rent (which amount is all that the above quoted finding can properly be said to encompass), it is obvious that sums became due to plaintiffs either as rent or, if the rent became a part of a mutual account, as the balance due on such account. And the trial court found "That it is not true that the alleged second cause of action [averring a mutual account * * * did not in part accrue or arise within four years immediately preceding the commencement of this action. * * *"

There is no direct finding as to whether an open, mutual, current account ever existed, and no finding whatsoever as to whether the rent charges became part of such account if it did exist. Whether there is a mutual account and whether the rent was an item in the account are the most vigorously disputed questions in this case, the questions to which the greater part of the evidence at the trial and the argument on appeal have been directed. Since the evidence is conflicting, these questions are issues of fact. (Copriviza v. Rilovich (1906), 4 Cal.App. 26, 30, 87 P. 398, and other cases cited in Ann.Cas. 1913D, 820, existence of mutual account; Foothill Ditch Co. v. Wallace Ranch Water Co. (1938), 25 Cal.App.2d 555, 566, 78 P.2d 215, book account; Searles v. Maritime Federation of Pacific Coast (1938), 28 Cal.App.2d 661, 664, 83 P.2d 100, and Kinkle v. Fruit Growers Supply Co. (1944), 63 Cal.App.2d 102, 114, 146 P.2d 8, account stated.) The failure to find on all material issues raised by the pleadings and evidence is ground for reversal, unless findings have been waived. (Fairchild v. Raines (1944), 24 Cal.2d 818, 830, 151 P.2d 260 and cases there cited; 2 Cal.Jur., p. 1032.)

[7, 8] The trial court did find "That it is not true that within four years last past the defendant became indebted to plaintiffs, or either of them, upon a balance due on an open, mutual and current account in the sum of $3,259.02, or in any amount whatsoever, which now remains unpaid." Where a cause is at issue upon defendant's denial of the allegations of a common count it is ordinarily true that a finding in the language of the common count, that is, a finding upon the ultimate fact, necessarily concludes the whole controversy and specific findings are not necessary. (Preston v. Dunn (1917), 33 Cal. App. 747, 749, 166 P. 603; Jacuzzi v. Jacuzzi (1918), 38 Cal.App. 533, 534, 176 P. 872; Tower v. Wilson (1919), 45 Cal. App. 123, 133, 188 P. 87; Wood v. Mesmer (1920), 46 Cal.App. 257, 259, 189 P. 134.) But here it is apparent that the trial court's failure to find specifically upon the most vigorously disputed issue in the case—whether the rent became a part of the account—was due to a misapprehension of law. Its oral ruling that "I am not going to allow the rent" was made as a ruling of law based upon the so-called "parol evidence rule," not as a finding of fact. Defendant relies upon cases which hold that items cannot be added to a book account, or a charge against one person shown to be a charge against another, by extrinsic evidence. (Wright v. Loaiza (1918), 177 Cal. 605, 607, 171 P. 311; Edwards v. California Sweet Potato Corporation (1930), 104 Cal.App. 715, 719-720, 286 P. 733; Egan v. Bishop (1935), 8 Cal.App.2d 119, 126, 47 P.2d 500.) The trial court accepted defendant's argument based upon the principle of these cases and ruled that plaintiffs could not "go outside of the evidence contained in the valise"; that the rent was not included in the account because it "is a derivative figure * * * you can't get that figure entirely from the slips in the box." But the rule as to book accounts (which must be written in a book) has no application to mutual, open, current accounts (which need not be kept in writing). "For a mutual, open, and current account it is not necessary that the account be kept in any particular form, and it is immaterial which party keeps the account (Carter v. Canty, 181 Cal. 749, 754, 186 P. 346), nor is it necessary that there be any written entry of the various charges on the account (Millet v. Bradbury, 109 Cal. 170, 173, 41 P. 865.)" (Schwindt v. Billiwhack Stock Farms (1941), 45 Cal.App.2d 208, 210, 113 P.2d 902, 903.) Even an unliquidated claim based on quantum meruit, it has been held, can be an item in a mutual, open,

current account. (Pedley v. Doyle (1918), 177 Cal. 284, 287, 170 P. 602; Culver v. Newhart (1912), 18 Cal.App. 614, 623, 123 P. 975.) It is apparent that here the trial court did not decide whether *in fact* the items shown on "the slips in the box" comprised the entire account because it accepted the view that as a matter *of law* they must. Since the evidence on the issue is conflicting the question must be resolved as an issue of fact in the light of the legal principles hereinabove enunciated.

[9, 10] Defendant contends that, regardless of developments at the trial, plaintiffs cannot recover because their bill of particulars, which is regarded as an amplification of the complaint, is defective. The bill of particulars does not set forth a mutual account. It simply lists the number of gallons of gasoline delivered, multiplies by one cent, shows the result as a charge against defendant, and credits defendant with cash payments of $1,642.93, described as "The credit of $1,642.93 referred to in the first cause of action." Defendant relies upon cases which hold that the admissibility of evidence and plaintiffs' right to recover are limited by the allegations of the bill of particulars. (E. g., Millet v. Bradbury (1895), supra, 109 Cal. 170, 172, 41 P. 865; Treadwell v. Nickel (1924), 194 Cal. 243, 263, 228 P. 25; Ames v. Bell (1907), 5 Cal.App. 1, 4, 89 P. 619; Gage v. Billing (1910), 12 Cal.App. 688, 692, 108 P. 664; Kurokawa v. Saroyan (1928), 95 Cal.App. 772, 775, 273 P. 613; Robertson v. Bonelli (1944), 65 Cal.App.2d 704, 705, 151 P.2d 307.) However, the record does not show that defendant before trial moved for and obtained an order excluding the evidence to which it now objects; and at the trial it did not object to the introduction of evidence of demands of both parties on the ground that they were not set forth in the bill of particulars. Therefore, defendant cannot now complain of the admission of such evidence. (1 Cal. Jur., p. 161.) Nor can defendant now object that the bill of particulars does not set forth a mutual account, for at the trial defendant, while consistently maintaining that there was no mutual account, did not object to the introduction of evidence tending to prove such an account, and the trial proceeded on the theory that the existence of a mutual account was in issue. (2 Cal.Jur., p. 239.)

[11] Defendant urges that the judgment can be upheld on the basis of the finding (supported by uncontradicted evidence) "that in and by said Lease and Consignment Contract * * * it was provided, among other things, that plaintiffs waive any claim against defendant as to quantity, quality, price, commissions, credits or other payments or settlements concerning any delivery or product thereunder, unless said claim was made by plaintiffs to defendant in writing within forty-eight hours after said delivery, and that no such written claim was made by plaintiffs to defendant in writing within forty-eight hours after any delivery or at all." However, it appears that the parties did not construe or apply the quoted provision as governing any such issue as that which seems controlling here; i. e., whether the rental items were included as elements of the mutual account; and it is obvious that the trial court did not base its decision that plaintiffs are not entitled to recover upon the quoted finding; it permitted other items which were incorrectly shown upon the vouchers and statements delivered to plaintiffs and which plaintiffs did not protest in writing, to be included in the recapitulation of account prepared by plaintiffs' accountant.

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

Rehearing denied; EDMONDS, J., dissenting.

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PEOPLE v. LOWELL et al.

Cr. 4060.

District Court of Appeal, Second District,
Division 2, California.
Dec. 19, 1946.

Rehearing Denied Dec. 30, 1946.

Hearing Denied Jan. 16, 1947.

1. Infants 🔑20

In prosecution for contributing to the delinquency of minors, prosecution was not limited to proof of particular acts described in respective informations, and could prove any other acts causing or tending to cause minors involved to lead an idle, dissolute, lewd, or immoral life. Welfare and Institutions Code, §§ 700, 702.

2. Criminal law 🔑372(1)

In prosecution for contributing to the delinquency of minors, evidence of acts similar to those charged, committed by defendants with other minors in the presence of minors named, was admissible. Welfare and Institutions Code, §§ 700, 702.

3. Infants 🔑20

In prosecution for contributing to the delinquency of minors, evidence is permissible as to general surroundings under which act described in information took place for purpose of showing that minor was encouraged, or induced to become, or was in danger of becoming, a delinquent person. Welfare and Institutions Code, §§ 700, 702.

4. Infants 🔑13

Where information charges the contribution to the delinquency of a minor and specifies an act of sexual intercourse, offense is not act of intercourse, but act of having contributed to delinquency of minor by a series of acts, one of them the act of intercourse, tending to cause him to become a person within the scope of juvenile court law. Welfare and Institutions Code, §§ 700, 702.

5. Witnesses 🔑277(4), 398(3)

Defendants' denial on direct examination of their presence in house when any act occurred which would contribute to the delinquency of a minor authorized cross-examination as to acts, other than those charged in information, by both defendants and authorized evidence contradicting their denials made on cross-examination. Welfare and Institutions Code, §§ 700, 700(k), 702.

6. Infants 🔑20

In prosecution for contributing to the delinquency of minors, where evidence tended to establish several acts contributing to such delinquency, court was not required to instruct jury that they must agree upon particular act or acts committed by defendants constituting the offense of contributing. Welfare and Institutions Code, §§ 700, 702.

7. Infants 🔑20

An information charging the crime of contributing to the delinquency of a minor and specifying a particular act of defendant, together with an allegation that such misconduct caused or tended to cause named minor to become delinquent is sufficient. Welfare and Institutions Code, §§ 700, 702.

8. Infants 🔑13

The purpose of statute denouncing contributing to the delinquency of minors is to make criminal the commission of any act tending to cause minors to become dependent or delinquent. Welfare and Institutions Code, §§ 700, 702.

9. Criminal law 🔑768(1)

In prosecution for contributing to the delinquency of minors, general instructions on the duties of jury under the evidence were proper. Welfare and Institutions Code, §§ 700, 702.

10. Criminal law 🔑772(3), 808½

Where information charges crime in words of statute, instructions which copy language of both information and the law are not erroneous.

11. Criminal law 🔑787(1), 824(13)

Failure to instruct jury that defendants' failure to explain or deny evidence against them created no presumption of guilt was not error. where such an instruction was not requested and where it was rendered unnecessary by defendants' categorical denials of evidence against them

12. Criminal law ⚷781(1)

Where prosecution did not rely for conviction substantially on evidence of defendants' oral admissions or confessions, instruction to the effect that extra judicial admissions of defendants should be viewed with caution was unnecessary.

Appeals from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Goldie Lowell and Audrey Rightmier were convicted of contributing to the delinquency of minors, and, from the judgments of conviction and from orders denying their motions for new trials, they appeal.

Affirmed.

Abbott C. Bernay and Everett H. Mills, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellants were charged, each in a separate information, with having contributed to the delinquency of minors, the specific charges being that each engaged in an act of sexual intercourse with a different minor on a different date. When the cases came on for trial appellants stipulated, and the district attorney agreed, that the two informations be consolidated for the purpose of trial and that appellants be tried together. Both were convicted, both made motions for new trials which were denied, and both have appealed from the respective judgments of conviction and from the orders denying new trials.

The only reasons advanced for the reversal of the judgments are (1) that the court erred in admitting evidence of other offenses than the acts of sexual intercourse specifically referred to in the informations, and (2) errors in giving and failing to give instructions to the jury.

The informations are in the customary form. Each appellant was charged with the crime of contributing to delinquency in that on or about a specific date and on occasions within one year prior to the filing of the information she did wilfully and unlawfully engage in an act of sexual intercourse with a named minor, one of them 17 years of age, the other 16, "and did commit acts and conduct tending to cause said minor to lead an idle, dissolute, lewd and immoral life, * * * all of which * * * did cause and manifestly tend to cause the said minor [naming him] to become and to remain a person within the provisions of one or more of the subdivisions of Section 700, Welfare and Institutions Code of the State of California."

Section 702 of said code provides that any person who commits any act which causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of section 700 is guilty of a misdemeanor. Section 700(k) extends the jurisdiction of the juvenile court to any person under the age of 21 years "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral life."

1. *Objections to evidence concerning acts other than those specified in the information.* Appellants are sisters, each residing in her own home. The evidence shows that Mrs. Lowell's home, during the absence of her husband in the Navy, was a rendezvous for teen-aged boys and girls, and that Mrs. Rightmier was frequently present when the juvenile parties were had.

Each of the minors testified in detail as to numerous acts of sexual intercourse which he had had with the defendant with whom his name is connected in the respective informations. Appellants complain of the admission of evidence (1) that they drank intoxicating liquor in the presence of the minors; (2) that the minors drank intoxicating liquor which was furnished by appellants; (3) that other minors were present and partook of intoxicating liquors when the minors named in the informations were present; (4) that when one or both of the minors specifically involved were present, appellant Lowell permitted a boy and a girl, both under age, to occupy a bedroom in her home for the purpose of committing an act of sexual intercourse, and that she stood guard at the door to prevent other persons from entering; (5) that appellants performed strip-tease dances in the presence of the named minors and others and committed other acts contributing to their delinquency.

[1-3] The prosecution was not limited in its proof to the particular acts described in the respective informations, but under the charge of contributing to delinquency was entitled to prove any other act causing or tending to cause either of the minors to lead an idle, dissolute, lewd or immoral life. Evidence of the acts of sexual intercourse specified in the informations having been offered, it was permissible to prove other acts committed by appellants tending to contribute to the delinquency of the minors. Evidence of similar acts committed with other minors in the presence of those named was admissible. People v. Hunt, 17 Cal. App.2d 284, 286, 61 P.2d 1208; People v. MacDonald, 53 Cal.App. 488, 491, 200 P. 491; People v. Ciulla, 44 Cal.App. 719, 722, 187 P. 46; People v. Huston, 21 Cal.2d 690, 695, 134 P.2d 758. Evidence is permissible of the general surroundings under which the act described in the information took place for the purpose of showing that the minor was encouraged or induced to become or was in danger of becoming a delinquent person. People v. Baker, 38 Cal.App. 28, 35, 175 P. 88; People v. Ferello, 92 Cal. App. 683, 689, 268 P. 915.

[4] The crime charged was not that of having engaged, on one occasion, in an act of sexual intercourse with a minor. Only one crime is named in the information, to wit, that of having contributed to the delinquency of a minor by a series of acts, one of them an act of sexual intercourse, tending to cause him to become within the juvenile court law—section 700 of the Welfare and Institutions Code. Under that statute evidence is admissible to show any conduct on the part of a person toward the minor named in the information which causes or tends to cause him to become a delinquent, whether such conduct consists in the doing of one act or a series of acts, People v. Koosistra, 58 Cal.App. 277, 279, 208 P. 316. People v. Oliver, 29 Cal.App. 576, 580, 156 P. 1005, and the district attorney is not required to elect as to any particular date or act upon which to rely for conviction. People v. Schoonderwood, 72 Cal.App.2d 125, 127, 164 P.2d 69. The cases relied on by appellants, People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Elliott, 119 Cal. 593, 51 P. 955; People v. Asavis, 22 Cal. App.2d 492, 71 P.2d 307; People v. Rogers, 26 Cal.App.2d 371, 79 P.2d 404, are not applicable here. They are the usual type of sex cases in which evidence is held to be inadmissible concerning acts engaged in by the accused with other persons at other times than that named in the information and out of the presence of the victim involved in the case on trial.

[5] Then, too, much of the evidence concerning the acts engaged in by appellants with minors other than those named in the informations was induced and warranted by the testimony given by appellants on direct examination by their own counsel. For example, Mrs. Lowell was asked; (1) "Have you ever been present in the house when any act of sexual intercourse took place between any other parties?" (2) "Did you ever see your sister do anything that you thought was wrong?" To each question her answer was in the negative. She was asked other questions by her counsel with reference to what had occurred at her home when both she and Mrs. Rightmier were present. To all such questions her answers were to the effect that nothing took place of a nature that would have contributed to the delinquency of a minor. These questions opened the door for the cross-examination which followed relating to other acts committed by both the witness and her co-defendant, Mrs. Rightmier. She was asked by the district attorney concerning an act of sexual intercourse between a boy and a girl in her home with her knowledge and connivance; whether she and Mrs. Rightmier drank intoxicating liquor in the presence of the minors; whether they furnished liquor to the minors; whether she engaged in acts of sexual intercourse with several other minor boys when those named in one or both of the informations were present in the house. She denied all such activities. Her direct examination having opened the road to cross-examination on these matters, it was not error to admit evidence contradicting her statements, especially in view of the

fact that one or both of the minors whose names appear in the informations were present at the time the acts took place. (See cases hereinbefore cited.)

In the instant case the acts contributing to the delinquency of the two named boys continued over a period of nearly three years. The Lowell home was a meeting place for minors of both sexes. One or both of the minors specifically named were present at the times referred to in the evidence. All the acts committed by appellants concerning which evidence was received contributed to the delinquency of the minors and caused them to become within the provisions of section 700(k) of the Welfare and Institutions Code. There was no error in the admission of evidence.

2. *Alleged errors in instructions to the jury.* (a) Appellants assign as error the failure of the court to give an instruction to the effect that the jury must agree upon the particular act or acts committed by appellants constituting the crime of contributing. This contention is based upon the fact that evidence was admitted, to which we have referred, concerning acts and conduct of appellants other than the acts of sexual intercourse with the minors named but occurring in their presence.

[6-8] The informations did not charge as crimes the acts of appellants in engaging in sexual intercourse with minors, but charged the crime of "contributing to delinquency" committed in the manner hereinbefore related, including not only the acts of sexual intercourse but other acts and conduct tending to cause the respective minors to lead idle, dissolute, lewd and immoral lives and to become persons defined within section 700 of the Welfare and Institutions Code. An information charging the crime of contributing and specifying a particular act on the part of each defendant, together with an allegation that such misconduct caused or tended to cause the named minor to become delinquent, is a sufficient pleading. People v. Wortman, 137 Cal.App. 339, 341, 342, 30 P.2d 565; People v. Oliver, 29 Cal.App. 576, 579, 156 P. 1005; People v. McDougal, 74 Cal.App. 666, 669, 671, 241 P. 598. "The purpose of [the] statute is to make criminal the commission of any act tending to cause minors to become dependent or delinquent." People v. McDougal, supra, at page 670 of 74 Cal.App., at page 600 of 241 P. It was no more necessary to advise the jury that they must agree upon a particular one of the several acts shown by the evidence to have been committed than to have required the district attorney to elect as to the act on which to rely for conviction. People v. Schoonderwood, 72 Cal.App.2d 125, 127, 164 P.2d 69.

[9, 10] The jury was instructed that they were to try the issues of fact presented by the allegations in the informations; that the defendants were entitled to the individual opinion of each juror on the issue of fact in the case; that any person who should commit any act which would cause or tend to cause any person under the age of 21 years to come within the provisions of section 700 of the juvenile court law is guilty of a misdemeanor; that if the jury should find from all the evidence beyond a reasonable doubt that defendants were guilty of the conduct alleged in the respective informations and that such conduct would manifestly encourage a minor to lead an idle, dissolute, lewd or immoral life, then they should find the defendants guilty. Since the informations charged the crime in the words of the statute, there was no error in the instructions that copied the language of both the informations and the law. Such instructions were held sufficient in People v. Young, 44 Cal.App. 279, 282, 186 P. 383, and People v. Shekell, 5 Cal.App.2d 537, 540, 43 P.2d 328.

A charge of contributing to delinquency in the language contained in the informations in the instant case bears no analogy to the decisions relied on by appellants. In People v. Scofield, 203 Cal. 703, 265 P. 914, the prosecution was under the Vehicle Code for having failed to stop and render aid. Any one of five specific acts would have constituted the offense, no one of which was necessarily related to the others. The court held that the jury should have been instructed that they should agree on one of the particular offenses. In People v. Dutra, 75 Cal.App.2d 311, 171 P.2d 41, 47, the defendant was charged with having induced a minor "to perform acts and to so live as would cause or manifestly tend to cause" him to become delinquent. The jury was instructed that if the defendant had committed any act or omitted the performance of any duty that would tend to cause the minor to lead an idle, lewd, dissolute or immoral life, a verdict of guilty should be returned. The information was manifestly insufficient in that it did not charge any specific act or acts to have been done by the defendant. People v. Giminiani, 70 Cal.App. 195, 199, 232 P. 993; People v. Wortman, 137 Cal.App. 339, 342, 30 P.2d 565. The defect in the information entitled the defendant to a reversal, hence the statement that it was error not to have instructed the jury that their verdict should be based on one specific act upon which they all should agree was dictum. Furthermore, an examination of the cases cited in the opinion will reveal that for the same reasons referred to in the discussion of People v. Scofield, supra, they do not sustain the text.* These cases obviously have no application to an information in the form of those filed against these appellants in which the crime charged is contributing and a specific act is alleged as one of the causes of delinquency.

[11] (b) Appellants contend that the court should have instructed the jury that their failure to explain or deny evidence against them created no presumption of guilt. Such an instruction was not requested by appellants and it was rendered unnecessary by their categorical denials of having engaged in acts of sexual intercourse with the minors whose names appear in the informations, or with any other minors; denials that they permitted minors to engage in acts of sexual intercourse in Mrs. Lowell's home; denials of having engaged in strip-tease dances or of having furnished intoxicating liquor to the minors. Since they denied all incriminating evidence introduced against them an instruction concerning their failure to deny was unnecessary and would have been surplusage.

[12] (c) Complaint is made that the court failed to instruct the jury to the effect that extrajudicial admissions of appellants should be viewed with caution. The instruction was unnecessary since this is not a case where the prosecution relied for conviction substantially, if at all, on evidence of appellants' oral admissions or confessions. Such evidence was minuscule in comparison with the other proof of guilt. The testimony of the various minors who were present upon numerous occasions in the Lowell home and there consumed intoxicating liquor, engaged in sexual intercourse with appellants, and observed the other acts herein described, is so overwhelming that the evidence of the oral statements of appellants could not have influenced the jury and does not require notice.

The respective judgments and orders denying new trials are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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* In People v. Williams, 133 Cal. 165, 65 P. 323, the defendant was charged with rape on the person of a girl 13 years of age. She testified as to numerous acts that occurred during a period of four months, each of which constituted a separate offense. It was held that one of the several offenses should have been selected on which to base a conviction. In People v. Hatch, 13 Cal.App. 521, 109 P. 1097, a prosecution for embezzlement, several misappropriations of money were proved though only one was charged in the indictment. It was held that the jury should have been required to agree on one particular offense. People v. Campridon, 204 Cal. 701, 268 P. 372, is a reaffirmation of People v. Scofield, which is distinguished from the instant case in the text of the opinion.

DE MILLE v. AMERICAN FEDERATION OF RADIO ARTISTS, LOS ANGELES LOCAL et al.*

Civ. 15067.

District Court of Appeal, Second District, Division 1, California.

Dec. 30, 1946.

Hearing Granted Feb. 27, 1947.

1. Trade unions 🔑4

Local union of radio artists had authority to assess members $1 to oppose initiative measure appearing on ballot on state election and deemed harmful by union to organized labor, under national union's constitution providing that assessments shall be fixed by locals subject to approval of national board of directors and that lawful rules and orders by locals shall be binding on each member.

2. Trade unions 🔑4, 7

Subsequent approval by national union of radio artists of local union's levying of assessment to oppose initiative measure appearing on ballot on state election constituted a "ratification" thereof, and assessment thereby became valid.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

3. Constitutional law 🔑90, 91
Elections 🔑10½

Requiring member of radio artists' union to pay assessment to oppose proposed initiative law that member personally favored did not violate his rights to suffrage, free speech, expression of thought, and the right of assembly.

4. Trade unions 🔑4

From time producer of radio program became a member of union of radio artists, he was bound, not only by constitutions and by-laws of national and local unions, but by the will of the majority of the membership, as lawfully expressed in accordance with such constitutions and by-laws, and as a member, he was contractually bound to submit to disciplinary action by union for his failure to pay assessment levied by local union to oppose initiative measure appearing on ballot in state election.

5. Elections 🔑317

Assessment by local union of radio artists to oppose initiative measure appearing on ballot in state election did not violate the Federal Corrupt Practice Act denouncing contributions by labor organizations in connection with congressional and presidential elections, since the act cannot interfere with state elections. Federal Corrupt Practice Act, 2 U.S.C.A. § 251.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Cecil B. De Mille against the American Federation of Radio Artists, Los Angeles Local, an unincorporated association, and others, to restrain defendants from suspending the plaintiff for his refusal to pay assessment. From a judgment dismissing the complaint, denying application for a preliminary injunction, dissolving restraining order, and discharging order to show cause, the plaintiff appeals.

Judgment affirmed.

Neil S. McCarthy, of Los Angeles, for appellant.

Beilenson & Berger, of Los Angeles, for respondents.

YORK, Presiding Justice.

As a member of American Federation of Radio Artists, Los Angeles Local (hereinafter referred to as AFRA), which is an affiliate of the national organization bearing the same name (hereinafter referred to as National), plaintiff by the instant action sought to restrain both organizations and the board of directors of AFRA from suspending him for his refusal to pay a One Dollar assessment which the union levied against its membership for financing its campaign in opposition to the "Right of Employment Act", an initiative measure appearing on the ballot in the State election of November 7, 1944, as "Proposition No. 12." A temporary restraining order and an order to show cause were duly issued and defendant union interposed a demurrer to the complaint, as amended, which was sustained without leave to amend. From the judgment dismissing the complaint, denying application for a preliminary injunction, dissolving the restraining order and discharging the order to show cause, plaintiff has perfected this appeal.

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* Subsequent opinion 187 P.2d 769.

Appellant is a radio artist and for more than eight years immediately prior to December 7, 1944, the date on which the complaint herein was filed, had been engaged in the presentation of a radio program as the producer of the Lux Radio Theatre of the Air, under contract with the J. Walter Thompson Company, said program being broadcast over the Columbia Broadcasting System. For his services in connection with said program, appellant received a total remuneration of $98,200 per year. AFRA had organized and effected a closed shop in the radio profession subsequent to the commencement by appellant of said radio program, and, because he could not perform over the air without becoming a member of AFRA, he joined the group on February 13, 1939.

On August 16, 1944, appellant received a notice that by action of the board of directors of AFRA, each member thereof had been assessed $1 to finance the campaign in opposition to Proposition No. 12 to be submitted to the electorate at the election of November 7, 1944. This notice set forth reasons for the opposition of organized labor to said proposition and stated that failure to pay the assessment before September 1, 1944, would result in suspension. The complaint alleges that "immediately upon receipt of such notice, plaintiff notified AFRA that the action set forth in said notice was without any authority and that plaintiff was not obligated to and would not pay the One Dollar ($1.00) referred to as the assessment in said notice, and that plaintiff has not paid said One Dollar ($1.00)." Because of nonpayment of the assessment, the officers of AFRA served a notice on appellant under date of November 21st calling attention to his delinquency in payment and reciting the contents of a resolution adopted by the board of directors to the effect that if any members were delinquent thirty days after November 1st, said board would determine any penalties, censures, suspensions or expulsions on account thereof; and on December 5th, appellant received notice that he would be automatically suspended on December 11th unless his delinquent payment had been made prior to that date.

Proposition No. 12, to which reference has heretofore been made, provided that: "Every person has the right to work and to seek, obtain and hold employment, without interference with or impairment or abridgment of said right because he does or does not belong to or pay money to a labor organization."

The official bulletin of AFRA published in July, 1944, which was mailed to the entire membership, including appellant, contained the following announcement:

"Membership meeting of AFRA will be held Monday, July 17th, at 8:30 P.M. at Studio 2 at CBS. On the Agenda there will be an explanation by Mr. Gene Kelly of the erroneously termed "Right of Employment" Bill. * * *

"The 'Right of Employment' Bill, if passed in the Fall Elections, will sound the death knell to Labor. This innocent-sounding bill has been so presented to the public that over 180,000 signatures appeared on the petition to have it placed on the ballot. This means that as members of Organized Labor we must do everything in our power to educate the public to undoing the harm they have set in motion, in many cases quite ignorantly, to the very people they thought they were helping. * * * A program is being mapped out which will call for vigorous action by all of us whose present standards of living are plainly at stake. * * *."

Appellant claimed in the trial court, as he does here, that respondents had no authority to levy the assessment; had no authority to levy any assessment for the stated purpose, and that the procedure to suspend him was contrary to and did not conform to the Constitution and By-Laws of AFRA. Appellant also asserts that by respondents' acts his constitutional rights to suffrage, free speech, life, liberty and the pursuit of happiness were invaded; that he was compelled to pay a tax for the exercise of his constitutional right to work, and that section 251 of 2 U.S.C.A., the Corrupt Practices Act of the United States was violated.

As hereinbefore stated, respondent is an open union which admits to membership all persons desiring to work as performers in the radio entertainment industry. Its organic law is set forth in the articles of agreement and constitution of National, and in the articles of agreement, constitution and by-laws of AFRA, by the terms of which each applicant, upon attainment of membership, is bound. Contrary to appellant's contention, the articles of agreement may be consulted for an explanation of the aims and objects sought to be effected by the respective constitutions. The articles of agreement of AFRA are to the effect that "We, the undersigned, * * * constitute ourselves a voluntary association * * * to advance, protect," etc., all those connected with radio performances, agree that AFRA its present members, "the undersigned," and persons hereafter becoming members, are to be governed by the constitutions and by-laws and all lawful rules of the National and that "the same shall be binding upon us and all subsequent members of this Local." The articles of agreement of National is substantially in the same form and recites the additional purpose "to secure proper legislation upon matters affecting" the professions of the various members.

Section 1, Article XI of National's constitution provides that initiation fees, dues and assessments shall be fixed by the locals for all members thereof, subject to approval of the National board of directors. This is a direct grant of power to the locals, including AFRA, to levy assessments. Article V provides that no person shall become a member of National or any Local unless he shall sign an application substantially providing that "he agrees to be bound by the respective Constitutions of the Association and Local * * * and by any By-Laws, rules, regulations and orders existing or thereafter lawfully enacted pursuant to such Constitutions and any amendments thereto." Section 5 of Article VIII, provides, among other things: "Subject to the provisions of the Charter and Constitution granted by the Association, and of this Constitution, each Local shall be autonomous and shall manage and govern its own affairs within the territory of its jurisdiction."

The constitution of AFRA, section 1, Article V, provides practically the same terms of membership as found in the constitution of National. Section 2, Article V, exempts honorary members but no others, from payment of dues and assessments. Article IX provides that matters not covered by the constitution and which are contained in the by-laws shall have equal force and effect with the constitution, that Local Boards shall have power to make rules supplementing the constitution and by-laws regarding all matters not covered by them, and that all lawful rules and orders made by the Local Board shall be binding upon each member from the time when lawfully made or given. By section 4, Article II, by-laws of AFRA, the Local Board is authorized to adopt rules supplementing the constitution and by-laws and covering matters not contained therein, such rules to have equal force and effect with the constitution and by-laws.

[1] Under the power and authority given by the foregoing, the board of directors of AFRA did not exceed its power in levying the assessment herein questioned.

Even though the dangers to AFRA implicit in Proposition No. 12 were debatable, AFRA was convinced of their reality and acted upon that conviction. And to say that AFRA could not legally contribute funds raised by assessment to oppose the proposition and that therefore the assessment was invalid, is to deny to organized labor the right to defend itself from attack.

Appellant points out that when he was first notified on August 16, 1944, that the assessment had been made, such action by AFRA had not been submitted to National for its approval as required by Article XII of the by-laws of AFRA. In this regard, the record discloses that National at its convention held on August 27, 1944, adopted a resolution condemning legislation of the character of Proposition No. 12 and undertaking to use all duly constituted means to defeat the same, and at a regular meeting of National held on October 26, 1944, its board of directors approved the assessment "levied by the Los Angeles Local membership and board on members of that local for a campaign fund to defeat California Proposition 12 which would outlaw the closed shop in California."

By further action on December 11, 1944, said National board interpreted its constitution and particularly Article XI as self-executing and as authorizing AFRA to levy assessments on its members and also interpreted sections 1 and 2, Article V; section 1, Article VI; section 1, Article IX of the Constitution; sections 1, 3 and 4, Article II and sections 1 and 3 of Article VI of the By-Laws of AFRA as authorizing and empowering the board of directors of AFRA to levy assessments upon its members for any purpose connected with the general welfare of its members, subject to approval or ratification by the National board. After fully reviewing the procedure followed by AFRA in "levying the assessment of $1.00 per member on its members for a campaign to defeat California Proposition No. 12, and in ordering the suspension from membership of its members who have failed to pay such assessment by December 11, 1944," said National board found and declared such procedure to be legal and valid in all respects.

[2] Such subsequent approval by National of AFRA's levying of the assessment constituted a ratification thereof. An act done without having been previously authorized is valid if subsequently ratified by those whose authorization was required by the by laws. Wickersham v. Crittenden, 110 Cal. 332, 334, 42 P. 893. AFRA did not fix the delinquency period until after the assessment had been approved by National.

[3] Appellant argues that he personally favored Proposition No. 12, which would have made union shops illegal, and contends that by paying the assessment to AFRA, he was giving expression to sentiments contrary to those which he holds, in violation of his rights of suffrage, freedom of speech, expression of thought, and the right of assembly.

In clubs, fraternal and civic organizations, business and professional organizations, private corporations and voluntary associations of all kinds, the doctrine of the acceptance by the minority of the decisions of the majority and those whom they have elected to determine the policies of the organization, is the basic principle of their organization and functioning. Also, it is well recognized that the minority in accepting the decisions made by the majority, individually reserve the right to disagree with the decisions so made, because it rarely happens in any action taken by an organization that it represents the unanimous belief of the membership. Therefore, no inference could possibly arise that appellant individually approved either the assessment or AFRA's stand against Proposition No. 12, and furthermore, he was entirely free to work in support of the proposition, regardless of the union's opposition.

[4] From the time appellant became a member of AFRA, he was bound not only by the constitutions and by-laws of the National and Local organizations, but also by the will of the majority of the membership, as lawfully expressed in accordance with such constitutions and by-laws. As a member of AFRA, appellant was contractually bound to submit to disciplinary action for his failure to pay the assessment levied.

[5] The Federal Corrupt Practices Act, 2 U.S.C.A. § 251, denounces contributions by labor organizations "in connection with any election" at which certain designated federal candidates, to-wit, presidential or vice-presidential electors, senators or representatives in Congress "are to be voted for." Proposition No. 12 was on the ballot at which there were candidates for all of these offices, but the funds were used not "in connection with" the election of such officers, but only in opposition to the said proposition. Act of Congress prohibiting expenditures in the election of federal officers cannot interfere with a state election at which electors vote at the same time for state officials, or on proposed amendments to the state constitution, or other matters.

From the foregoing it appears that the $1 assessment levied by AFRA in connection with its opposition to Proposition No. 12 was for a union purpose, was duly authorized under the constitution and by-laws of said organization and that the suspension of appellant for nonpayment thereof must be sustained.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

77 Cal.App.2d 467

PEOPLE v. GELARDI.

Cr. 2405.

District Court of Appeal, First District, Division 2, California.

Dec. 31, 1946.

Rehearing Denied Jan. 14, 1947.

Hearing Denied Jan. 27, 1947.

1. Indictment and information 🔑120

In information charging the unlawful selling of a "narcotic, to-wit opiates" the specification of "opiates" added nothing to the information and was treated as mere surplusage. Health and Safety Code, §§ 11001, 11160.

2. Indictment and information 🔑110(59)

Information following language of statute charging unlawful selling of a narcotic was sufficient in absence of a special demurrer, notwithstanding the narcotic allegedly sold was not specified in the information. Health and Safety Code, §§ 11001, 11160; Penal Code, §§ 950–952, 1004, subds. 2, 4.

3. Poisons 🔑9

Information charging unlawful selling of narcotics was not defective for failing to name the person to whom the narcotics were sold. Health and Safety Code, §§ 11001, 11160.

4. Poisons 🔑9

In prosecution of a pharmacist for unlawfully selling narcotics that accused made the sales with a written prescription of a physician was a matter of defense and information was not required to allege that the sales were made without a written prescription. Health and Safety Code, §§ 11001, 11160.

5. Criminal law 🔑202(1)

Misdemeanor conviction in municipal court for selling nembutal capsules without a prescription did not jeopardize defendant so as to bar subsequent prosecution for sale of morphine without a prescription, notwithstanding both of the sales were of drugs and were contemporaneous. Health and Safety Code, §§ 11001, 11160; Penal Code, § 347½.

6. Criminal law 🔑739(4)

Generally, former jeopardy is a question of fact, and hence should be passed on by the jury, but in certain circumstances it may become purely a question of law.

7. Criminal law 🔑260(11)

Where facts forming basis of defendant's plea of former jeopardy were undisputed and if there had been a jury, the trial judge would have been required to direct a verdict against the plea of former jeopardy, failure to make a special finding on issue of former jeopardy was not prejudicial to defendant. Const. art. 6, § 4½.

8. Criminal law 🔑260(4)

Conviction for unlawfully selling narcotics without a prescription could not be reversed on ground that case had not been completely tried because the trial court had not found on issue of former jeopardy where the failure to find on issue of former jeopardy was not called to trial court's attention when opportunity presented itself at time when the failure could have been readily corrected. Health and Safety Code, §§ 11001, 11160; Const. art. 6, § 4½.

9. Criminal law 🔑569

In prosecution for unlawfully selling narcotics evidence did not sustain defendant's contention that defendant was entrapped. Health and Safety Code, §§ 11001, 11160.

10. Poisons 🔑4

That doctor telephoned defendant to let a specified person have morphine without a prescription was not a defense to prosecution under statute requiring a written prescription for sale of morphine. Health and Safety Code, §§ 11001, 11160.

11. Poisons ⟹9

Evidence sustained conviction for unlawfully selling narcotics. Health and Safety Code, §§ 11001, 11160.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Joseph Gelardi was convicted of selling narcotics without a prescription, and he appeals.

Judgment affirmed.

Joseph P. Lacey, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Miriam E. Wolff, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty., and Alvin E. Weinberger, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

The appellant was convicted of four violations of section 11160 of the Health and Safety Code after trial by the court sitting without a jury and was sentenced to serve one year in the county jail on each conviction, the sentences to run concurrently. He appeals from the judgment and from the order denying a new trial.

Section 11160 reads: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, * * * a narcotic except upon the written prescription of a physician, dentist, chiropodist or veterinarian licensed to practice in this State." Section 11001 of the same code defines narcotics as follows: " 'Narcotics,' as used in this division, means any of the following: (a) Cocaine. (b) Opium. (c) Morphine. (d) Codeine. (e) Heroin. (f) Alpha eucaine. (g) Beta eucaine. (h) Chloral hydrate. (i) All parts of the plant loco weed or of the plant cannabis sativa * * *."

The information in four counts charged violations on April 12th, 16th, 20th and 23rd, 1945. The sales in question were of morphine tablets, without written prescriptions therefor.

The appellant's attack is on four grounds: (1st) the claimed insufficiency of the information; (2nd) that appellant was placed twice in jeopardy for the same offense and there was no separate finding on this plea; (3rd) that he was the victim of an entrapment, and (4th) that the evidence is insufficient to support the conviction.

Appellant has been a licensed pharmacist for upwards of 20 years, and at the time in question conducted a drug store on Fillmore street, in San Francisco.

A woman who was a known drug addict, employed as an operator by one of the state narcotic inspectors, made the purchases in question. On April 12, 1945, about 8:45 p. m. she entered appellant's store, followed by the inspector, who stayed in the background to observe. He saw appellant and the operator engaged in a conversation lasting a minute or two; he saw money change hands and he saw the appellant hand something to her. She had been searched before entering and had been given a $20. bill. She came out with 2 one-grain morphine tablets and a $10. bill in change.

On April 16 three visits were made to the store by the operator accompanied by the inspector, whose role, as before, was that of observer. The first visit was in the morning, when the operator purchased 60 capsules of barbiturates (not involved herein) without a written prescription. The second visit was in the afternoon at which time appellant refused to sell the operator any morphine without a written prescription, and referred her to a physician who had an office a few doors away. She called on this physician and was examined by him. Between his office and appellant's store there was a direct telephone line which had been installed for the purpose of telephoning prescriptions. Appellant testified that the doctor telephoned him to let her have some morphine and that he would follow it up with a written prescription. About 4 p. m. she entered the store with a $5. bill in her possession and came out with a one-grain morphine tablet and $2.50 in change.

On April 20 the operator and the inspector entered the store about 3 p. m. She handed appellant a prescription (for cough medicine); also a $20. bill which had been supplied by the inspector. She came out with a bottle of cough medicine, a half-grain morphine tablet and $8.65 in change. The cost of the cough medicine was $1.35. There was on the bottle an ordinary label. It was numbered and dated, it prescribed the dosage, and it gave the patient's name, the prescribing doctor's name (the physician already referred to) and the appellant's store name.

On April 23 the operator and the inspector made their last visit to appellant's store. As on all earlier visits, the conversation between the operator and appellant lasted not longer than two minutes. She had been supplied with a $20. bill and a $5. bill. She came out with 2 half-grain morphine tablets and a box containing 46 nembutal capsules, but with no change. Two other inspectors awaited outside. The three inspectors then entered the store, confronted the appellant, and found the $20. bill and the $5. bill (the serial numbers having been noted beforehand) on the marble slab of the cash register. The inspector testified that when he questioned appellant as to these bills, appellant answered that he had received them on a sale of nembutal and ephedrine.

The record contains no denial by the appellant of these sales and no claim that there were any written prescriptions for them. The inspector went through appellant's prescriptions and found none covering any of the four sales. Appellant testified that he had acted on the strength of the doctor's telephone conversations and his promise to follow them up with written prescriptions. The doctor's testimony respecting the telephone conversations was vague and indefinite. The prosecution stresses the fact that the doctor took the time to write out a conventional prescription for the cough medicine (which cost only $1.35) but did not take the time to write any prescription for the narcotics.

The appellant's first point is that no public offense is stated in the information or in any count thereof.

Each count contains the accusation that on or about a given day appellant "did wilfully, unlawfully and feloniously sell, furnish and give away a narcotic, to-wit: Opiates, in violation of Section 11160, Health and Safety Code * * *."

Section 1004, Penal Code provides for a demurrer on the grounds (subd. 2) that the information does not substantially conform to sections 950, 951 and 952, and (subd. 4) that the facts stated do not constitute a public offense. No demurrer, either general or special, was interposed in this case.

Appellant's first ground of attack is that the accusation does not show that the substance sold was any one of the nine narcotics within the definition of section 11001.

[1] The way in which this information was drafted has invited this attack. The appellant was arrested for selling morphine. Instead of simply accusing him of selling a narcotic, to-wit, morphine the pleader used the words "a narcotic, to-wit: Opiates", thereby following a general term with another broad and indefinite term. While an opiate is defined (Webster New International Dictionary, 2d. Ed.) as "Any medicine containing, or derived from, opium * * *" it is also there defined as "Anything which induces rest or inaction; that which quiets uneasiness". The "specification" of opiates adds nothing whatever to the information and it may be treated as mere surplusage (the same as the statutory words "Furnish, and give away" may be disregarded—see People v. Kinsley, 118 Cal.App. 593, 597, 5 P.2d 938, 940).

[2] However, without any specification of either opiates or morphine the accusation is sufficient, for it follows the language of the statute, and nothing beyond that is required in the absence of a special demurrer. People v. Kinsley, 118 Cal.App. 593, 596, 5 P.2d 938; People v. Pustau, 39 Cal. App.2d 407, 412, 103 P.2d 224.

[3] Next, it is claimed that the information is fatally defective in failing to name the person to whom the narcotics were sold. "This is a defect which must be raised by a special demurrer * * *." (People v. Kinsley, supra) and, as held in that case, "Even if appellant had pointed out the defect * * * by special demurrer, his objection would not have been well taken. People v. Faust, 113 Cal. 172, 45 P. 261; People v. Malone, 68 Cal.App. 615, 229 P. 1000."

[4] The next point raised is that the language of the information does not negative the exception in that there is no allegation that the sales were made without the written prescription of a physician. This is answered by the case of People v. Kinsley, supra, following Ex parte Hornef, 154 Cal. 355, 362, 97 P. 891, and by People v. Bill, 140 Cal.App. 389, 35 P.2d 645, which is directly in point. Paraphrasing the last-cited case (140 Cal.App. at page 393, 35 P. 2d 645), if the accused person unlawfully sells a narcotic, it follows that he does not hold a written prescription therefor. The cases hold that it is a matter of defense that the accused person made the sale with a written prescription. People v. Fowler, 32 Cal.App.Supp.2d 737, 742, 84 P.2d 326, and People v. Smith, 54 Cal.App.2d 587, 589, 129 P.2d 732 are to the same effect and People v. Pierce, 14 Cal.2d 639, 643, 96 P.2d 784 reaffirms this line of cases.

The appellant contends that his plea of once in jeopardy should have been sustained.

[5] The basis for this attack is the fact (already discussed) that the information charges the sale of opiates, while appellant had been already charged in the Municipal Court with the sale of opiates on the same two occasions as those now involved and had pleaded guilty and paid his fine. The conviction of that lesser offense, appellant argues, bars this prosecution for a higher offense.

Misdemeanor complaints were filed in the Municipal Court charging several sales without prescriptions of "a barbituric acid derivative" in violation of section 347½ of the Penal Code. Two of those sales—one on the 12th, the other on the 23rd, of April —were made at the same time as two of the sales of morphine now before the court.

Section 347½ read at the time as follows:

"It shall be unlawful for any person, * * * to sell, furnish, or give away * * * any veronl, barbital (acid diethyl-barbituric) or other barbituric acid derivative of their salts, derivatives, or compounds of the foregoing substance, or any preparation or compound containing any of the foregoing substances, or their salts, derivatives or compounds, except upon the order or prescription of a physician and surgeon, dentist, chiropodist, or veterinary surgeon * * *." The penalty prescribed by this section was a fine not exceeding $200. or imprisonment in the county jail not exceeding six months, or both.

The prosecutions in the Municipal Court were for the sale of 60 nembutal capsules on April 12th and of 46 nembutal capsules on April 23rd, such sales without a prescription being denounced as a misdemeanor by section 347½. The present prosecutions were for sales of morphine without a prescription, denounced as a felony by section 11160, Health and Safety Code. Hence the appellant was prosecuted under two distinct statutes for selling two different drugs, one defined by law as a "narcotic", the other not so defined.

The answer to appellant's contention is found in the case of Rodriguez v. Superior Court, 27 Cal.2d 500, 501, 165 P.2d 1, 2, where the court says: "The test, however, is the identity of the offenses and not the identity of the occurrence from which they arise. A defendant may be convicted of separate offenses arising out of the same transaction when each charge is separately stated and the offenses differ in their elements and one is not included in the other [citations]". The court therein quotes from People v. Kearney, 20 Cal.2d 435, 126 P.2d 612, 614, as follows: "* * * The contention is answered by section 954 of the Penal Code, which provides that where, as here, a defendant is charged with two or more different offenses connected together in their commission, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count' [citations]."

The mere coincidence that both sales were of drugs is of no more consequence than the circumstance that both sales might have been rung up on the cash register together. Each sale was a complete offense by itself, and neither offense was, or could have been, included within the other. Certainly proof of the sale of nembutal would not support a conviction under section 11160, nor would proof of a sale of morphine support a conviction under section 347½. The contemporaneous sales of morphine and

"Other barbituric acid derivative" (both conditionally prohibited) had no more identity or oneness then would have had the contemporaneous sales of morphine and explosives (both likewise prohibited).

The court in deciding this case simply declared that the defendant was "guilty as charged". The appellant contends that the judgment must be reversed because of the failure to find on the plea of former jeopardy, citing People v. Kinsey, 51 Cal. 278; People v. Helbing, 59 Cal. 567; People v. Fuqua, 61 Cal. 377; People v. Hamberg, 84 Cal. 468, 24 P. 298; People v. Tucker, 115 Cal. 337, 47 P. 111, and Ex parte King, 10 Cal.App. 282, 101 P. 810, all of which hold that such failure is reversible error. The case of People v. Frank, 75 Cal.App. 74, 81, 82, 241 P. 924, 927, after citing all six cases, says that "Since the above cases were decided, there have been some decisions * * * which, while not directly overruling these cases, or for that matter even referring to them, appear to enunciate a somewhat different rule. * * *. From these later decisions, we question whether the strict rule invoked in the earlier cases above referred to can now be considered the law in this state." In that case the failure to make a separate finding on the jeopardy plea was held not prejudicial. A petition for hearing was denied by the Supreme Court.

In People v. Grace, 88 Cal.App. 222, 232, 263 P. 306, where, likewise, the Supreme Court denied a hearing, there was a similar holding.

[6] While, generally speaking, former jeopardy is a question of fact, and hence should be passed on by the jury, in certain circumstances it may become purely a question of law. People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Cummings, 123 Cal. 269, 55 P. 898; People v. Newell, 192 Cal. 659, 221 P. 622; People v. Wilkison, 30 Cal.App. 473, 477, 158 P. 1067; People v. McNeer, 8 Cal.App.2d 676, 683, 47 P.2d 813.

[7] In the case at bar the appellant in support of his plea of former jeopardy introduced in evidence the complaints filed in the Municipal Court charging the violations of section 347½, and elicited by the cross-examination of the state inspector the fact that the two sales in question (one of morphine, the other of nembutal) were contemporaneous on both occasions. No question of fact was raised, for the nature of the Municipal Court charges and the fact of the contemporaneous sales of both drugs were uncontradicted. Under the authorities cited, had there been a jury trial it would have been the duty of the judge to direct a verdict against the plea of former jeopardy. As it was there was no jury to instruct, and the court's failure to make a special finding could not possibly have prejudiced the appellant. Such finding would have been a mere formality.

In addition to what has been said, the record shows that when the time came for sentence appellant's counsel stated, "At this time we respectfully move the court to dismiss on all grounds, because none of the facts stated are sufficient to constitute a public offense, and we submit the motion." The motion was denied.

[8] It will be noted that when the opportunity was thus presented for appellant to state whatever grounds he had why sentence should not be pronounced, one of which might have been that the case had not been completely tried because the court had not found on the issue of former jeopardy, the point now urged on appeal was not made. The failure to find, could then have been readily corrected, but it was not called to the court's attention. This is an added reason why there should be no reversal on this ground. See People v. Strickler, 167 Cal. 627, 628, 140 P. 270.

The appellant's next point is that the conviction cannot be sustained because the commission of each of the offenses charged "was conceived, instigated and solicited by the officers of the State, who played throughout, the role of agents provocateur."

The appellant on cross-examination was asked "What is the standard price, let us say, for a dozen morphine sulphate tablets, one grain?" to which he replied, "I would say two and a half."

The record shows the following: on the first occasion April 12, appellant sold two 1-grain morphine tablets and 60 capsules of nembutal for $10.; on April 16 he sold one 1-grain morphine tablet for $2.50; on April 20 he sold one ½ grain morphine tablet for $10., and on April 23 he sold two ½ grain morphine tablets and 46 capsules of nembutal for $25.

The record does not show the price at which the nembutal capsules ordinarily sell, or the price which appellant charged for them, so it is not possible to arrive by process of elimination at the price charged for the morphine on the two occasions when both drugs were sold. However on April 16 (when no nembutal was sold) appellant received $2.50 for one 1-grain morphine tablet, when admittedly the price was $2.50 for a dozen of them. And on April 20 he received $10. for one ½ grain morphine tablet which was 8 times what he had charged four days before, and 8 times the standard price for a dozen. On April 23 he received $25. for two ½ grain morphine tablets and 46 nembutal capsules, which was 2½ times what he had charged on April 12 for one-half the quantity of morphine and but 14 more capsules. These facts were before the trial judge, addressed, naturally, to the question whether there was a willing seller as well as a willing buyer.

The morphine tablets were, in each instance, put into a perfectly blank envelope.

A prescription was written out for the cough medicine, as we have seen, and that prescription was filled in the ordinary way. The price for it was $1.35 only. No written prescriptions whatever were made out for the morphine.

The record shows that on the occasion of each sale the conversation between the appellant and the operator lasted for no longer than a minute and a half or two minutes.

It is perfectly true the operator appeared to be in physical pain and distress, and the appellant testified that she pleaded for the morphine. She was sent to a doctor for examination and returned to the drug store with a prescription,—for cough medicine—but received, nevertheless, morphine without any written prescription.

[9] The evidence shows that before the first sale of morphine, on April 12, the operator had made several purchases of nembutal from appellant without a written prescription, and had thus gained his confidence. We need hardly comment on the fact that the confidence thus gained was built upon sales which were themselves illegal, under section 347½ Penal Code.

We have recounted only part of the evidence dealing with the alleged entrapment. From what has been said it will readily be seen that there was ample evidence to convince the trial court that the appellant was not lured or led into trouble without any intent on his part to commit these repeated offenses. See People v. Makovsky, 3 Cal. 2d 366, 369, 44 P.2d 536; In re Wong Poy, 113 Cal.App. 677, 298 P. 1029.

Lastly the appellant claims that the evidence was insufficient to justify the conviction.

[10, 11] From what has been said it must be clear that there was ample evidence. The making of the last three sales without written prescriptions was not, in fact, denied. "The invocation of the defense [of entrapment, just discussed] necessarily assumes that the act charged as a public offense was committed." People v. Grijalva, 48 Cal.App.2d 690, 694, 121 P.2d 32, 34, quoting People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003. Granting that, as appellant testified, the doctor telephoned him to let the operator have the morphine, that, of course, is no defense, for the statute requires, for good and sufficient reasons, a written prescription. The judgment of conviction is amply supported.

For the reasons given in the discussion of former jeopardy the court's failure to find on that issue was not, in view of the entire record in this case, prejudicial error (Sec. 4½ of art. VI, Const. of California).

The appeal taken from the order denying appellant's motion in arrest of judgment is dismissed. Such an order is not appealable.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

CROWN PRODUCTS CO. v. CALIFORNIA FOOD PRODUCTS CORPORATION.

Civ. 13115.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1947.

Rehearing Denied Feb. 7, 1947.

Hearing Denied March 6, 1947.

1. Appeal and error 🔑1008(1)

In action for breach of sales contract, conflict in evidence as to whether seller refused to make deliveries at contract price was for trial court trying case.

2. Sales 🔑89

A 1943 contract extending time of delivery of vinegar one day, increasing price for 1943–44 deliveries from 5 cents to 7½ cents per gallon, and changing type of vinegar from 59½-grain to 60-grain, was not new contract but modification of 1941 contract for sale of 350,000 gallons annually of 59½-grain vinegar at 5 cents per gallon for three-year period, and seller refusing to make 1943–44 deliveries could be sued for breach of 1941 contract as modified.

3. Accord and satisfaction 🔑16

Where original contract required seller to deliver designated amount of vinegar annually to buyer for three-year period, and seller was in default in amount of deliveries for first two years, and buyer and seller executed second contract by which buyer agreed to waive past defaults if seller would deliver full amount in third year, the old obligation remained in force until new obligation was performed, if second contract was an accord. Civ.Code, §§ 1521–1523.

4. Accord and satisfaction 🔑17

A seller could sue for damages for breach of original contract for sale of designated amount of vinegar annually for three years, notwithstanding that seller and buyer executed second contract by which buyer agreed to waive defects in amount of deliveries for first two years if seller would deliver full amount in third year, where second contract was not performed by seller.

5. Novation 🔑10

If second contract, by which buyer agreed to waive defects in amount of deliveries of vinegar for first two years if seller would deliver in the third year the full amount called for in original three-year contract for sale of vinegar, constituted a novation, original obligation would thereby be extended only if buyer and seller so intended. Civ.Code, §§ 1530, 1532.

6. Pleading 🔑237(1)

Where cause of action is imperfectly pleaded in original complaint, trial court in its discretion may permit amendment of complaint to conform to the proof. Code Civ.Proc. §§ 469, 470.

7. Pleading 🔑237(1, 8)

The allowance of amendments of pleadings to conform to proof rests in trial court's sound discretion which is not abused unless prejudice appears and new and entirely different issues are brought into the case. Code Civ.Proc. § 470.

8. Pleading 🔑237(1)

The greatest liberality is encouraged in allowing amendments of pleadings to conform to the proof. Code Civ.Proc. § 470.

9. Pleading 🔑1

The purpose of pleadings is to fairly inform the parties of the nature of the cause of action or the defense.

10. Appeal and error 🔑1039(13)

Where a case is fully and fairly tried and all relevant issues are fully developed and both sides have a full and fair opportunity to present all relevant evidence on the pertinent issues, cause will not be reversed merely because pleadings fail to fully disclose all of the related issues.

11. Contracts 🔑327(1)

In cases of anticipatory breach of contract, bringing of suit is sufficient election to treat repudiation as a breach and to prevent retraction thereof.

12. Damages 🔑62(4)

Innocent party has duty to minimize damages for breach of contract.

13. Damages ⚷62(4)

The duty of innocent party to minimize damages for breach of contract does not extend to compulsion of accepting at even the contract price less than the quantity specified in contract, where circumstances show that there was no intention to deliver the balance, at least where suit is filed before such imperfect tender. Civ. Code, § 1764.

14. Sales ⚷418(7)

A buyer of vinegar was not required to accept shipment tendered by seller in order to mitigate damages, where tender was not in good faith and was made after seller repudiated contract.

15. Sales ⚷418(3)

Where seller breached contract for sale of vinegar at 7½ cents a gallon by refusing to make further deliveries unless buyer would agree to pay on sliding scale between 7½ cents a gallon and 10 cents a gallon, computation of damages for seller's breach on basis of difference between 7½ cents a gallon and 10 cents a gallon was not error, notwithstanding that damages computed on sliding scale would have been less than damages allowed, in view of fact that damages allowed were substantially less than could have been allowed if loss of profits had been considered.

16. Sales ⚷172

A seller, refusing to make deliveries in the third year under contract for sale of vinegar for three years unless buyer would pay more than contract price, breached contract and not buyer, notwithstanding that in preceding years the buyer had agreed to pay more than contract price.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for damages for breach of contract by Crown Products Company, a limited co-partnership, against California Food Products Corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Lorne M. Stanley and Richard tum Suden, both of San Francisco, for appellant.

Heim Goldman and Raymond H. Shone, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover damages from defendant for breach of contract. The trial court found that defendant had breached the contract, fixed plaintiff's damages at $8,610.35, and entered its judgment accordingly. Defendant appeals.

The facts are as follows: Under date of January 20, 1941, Joseph Smooke, general manager of plaintiff, and Neal Harris, secretary of defendant, on behalf of their respective companies, entered into a properly executed written contract whereby the defendant agreed to sell and the plaintiff agreed to buy "during each of the years 1941, 1942 and 1943, a total of not less than 300,000 gallons and not more than 400,000 gallons 59½ grain cider vinegar." The contract also provided that "for the purpose of this contract, the year shall start October 1 and end September 30"; that "the price of this vinegar shall be five cents per gallon less two percent F.O.B. Sebastopol payment in five days from shipment"; that the vinegar should be of a certain type and should be shipped in a designated fashion; that the "seller has made contracts for the purchase of apple juice and has storage capacity in Sebastopol to carry said apple juice. But in the case of crop failure, fire, earthquake or an act of God making it impossible to fulfill the terms of this contract, then both buyer and seller shall be relieved from further fulfillment until such catastrophe may be remedied."

In 1941 the parties orally agreed that the price of the vinegar covered by the above contract should be changed to six cents per gallon, and in 1942 the parties orally agreed that such price should be seven and one-half cents per gallon. At no time during the contract period did defendant deliver the quantity of vinegar it had contracted to deliver. For the year ending September 30, 1942, the defendant delivered 209,403 gallons; for the year ending September 30, 1943, there was delivered 73,879 gallons; and that for the year ending September 30, 1944, but 5,586 gallons were delivered.

In August, 1943, Smooke and Harris discussed the question of shortages in the deliveries, and other matters relating to the contract. At that time Smooke told Harris that his company did not desire litigation, that it did not feel that defendant had dealt fairly with them, but that if defendant would agree to deliver the full 350,000 gallons called for by the contract for the 1943-1944 period the plaintiff would agree to waive the past defaults. As a result of this conversation the defendant sent to plaintiff a letter dated August 30, 1943, which provides: "Confirming conversation between you and writer, of a week ago, we are to deliver to you between present time and October 1, 1944, 350,000 gallons of 60-grain cider vinegar at the same price as we have been billing which is 7½ cents a gallon. This delivery will be in full for existing contract in force at present between the Crown Products Corp. and the California Food Prod. Corp." Under date of September 3, 1943, the plaintiff wrote to defendant to "acknowledge acceptance of the terms and conditions regarding vinegar as set forth in your letter * * * of August 30, 1943 * * *" After this modification, the defendant delivered 5,586 gallons of vinegar, but failed to deliver the balance.

In September, 1943, Harris called upon Smooke and told him that his company refused to make any further deliveries unless plaintiff agreed to an increase in the price. According to Smooke, Harris then told him that "if you want to have any more vinegar you have to pay me ten cents a gallon for that vinegar or otherwise we will stop making deliveries." The plaintiff thereupon consulted its attorney, and the attorney wrote to defendant under date of September 29, 1943. A day or so later Harris called upon the attorney. The attorney testified that Harris then told him "that unless he got more money he would not make any deliveries." When Harris' attention was called to the contract price Harris replied: "Well, I can't make any deliveries at that price, and I won't make any unless I get an increase in price. * * * I want 7½ cents for the first 50,000 gallons, 8½ cents for the next 50,000, 9½ cents for the third 50,000, and 10 cents a gallon for all over that." This suggested increase was to be under the 1943 contract. When Harris' attention was called to the fact that his company had a covering contract to secure apple juice from the California Conserving Company, he replied: "I won't do that unless I get that increase in price. I will not make any deliveries of that kind." The attorney then agreed to submit the suggested increase to Smooke. Smooke refused to pay the increase, and told the attorney to tell Harris that he insisted on deliveries according to the contract as modified. The attorney, early in October, 1943, conveyed Smooke's message to Harris. Harris, according to the attorney, replied: "Very well, then, we are all through, I won't make any further deliveries."

[1] Harris, as a witness for defendant, denied most of the above statements attributed to him, except that he did admit making a sliding scale proposition to plaintiff's attorney somewhat different from that testified to by the attorney for plaintiff. He denied refusing to deliver, and testified that when Smooke refused to pay the higher price, he, Harris, told the attorney: "O.K., then I will have to deliver." This conflict was for the trial court.

This action was filed on October 14, 1943. On November 12, 1943, which was before service of summons but after defendant had actual knowledge that the action had been filed, defendant tendered a delivery of a little over 2,700 gallons of vinegar at 7½ cents per gallon. The plaintiff rejected the delivery and by letter dated November 15, 1943, informed defendant that the refusal was based upon the fact "that you had previously refused to carry out the terms of your contract with us." The letter also stated that "Your attempted delivery is not in good faith, but merely one to avoid your liability for damages." Smooke testified that this delivery was rejected on the advice of his attorney.

Harris testified that between August 1, 1943, and September 30, 1944, his company could have delivered the full 350,000 gallons.

In January, 1944, the defendant offered 50,000 gallons for delivery. This was offered, however, on the condition that acceptance by plaintiff would clear up all the outstanding contracts. The plaintiff rejected the offer. There is evidence that there was no vinegar available to plaintiff at any price on the open market from August, 1943, to September, 1944, and also evidence that the price of vinegar had gone up to 20 cents a gallon.

In view of defendant's contentions on this appeal some reference must be made to the pleadings. The cause went to trial on the first amended complaint and the answer thereto. The amended complaint sets forth the contract of January 20, 1941, in haec verba, and alleges defendant breached the same in September, 1943. No mention is made in the amended complaint to the modification of August 30, 1943. It is alleged that because of defendant's breach of the 1941 contract the plaintiff lost profits of $85,493.90. Defendant's general and special demurrers to this amended complaint were overruled. By its amended answer defendant admitted the execution of the January 20, 1941, contract but alleged that the terms of such contract were changed by a written agreement of August 30, 1943, which substituted this new contract for the old one. The cause went to trial on these pleadings. At the conclusion of the trial, during which both the 1941 and 1943 contracts were introduced into evidence, and all facts relating to both contracts fully inquired into, the trial court directed the plaintiff to amend its complaint to conform to the proof. Plaintiff subsequently filed such an amendment in which the 1941 contract is set forth and then the 1943 contract is pleaded in haec verba, and damages under the 1943 contract asked for in the sum of $42,620.43. Defendant vigorously objected to this amendment by demurrer and by motion to strike. The demurrer was overruled and the motion to strike denied.

The court found that the 1941 and 1943 contracts were executed as set forth in the amended complaint and the amendment thereto, and that when the 1943 contract was entered into the defendant was then delinquent in deliveries under the 1941 contract; that the 1943 contract modified the 1941 contract; that it was agreed that "performance under the terms of the August, 1943, contract should be in full for the January 20, 1941, contract"; that defendant delivered 5,586 gallons of vinegar under the 1943 contract; that after the last delivery made in September, 1943, defendant breached the 1943 contract by refusing to make further deliveries thereunder; that there was no other vinegar obtainable on the market; that plaintiff could not have obtained any other vinegar except that it could have obtained the balance of 344,414 gallons by paying defendant ten cents a gallon; that by reason of defendant's failure to perform the 1943 contract plaintiff has been damaged in the sum of $8,610.35. This figure was determined by multiplying the 344,414 undelivered gallons by 2½ cents, the difference between 7½ cents per gallon provided in the 1943 contract and the 10 cents per gallon demanded by defendant.

[2-5] The defendant makes a whole series of related arguments on this appeal all dependent on the premises that the plaintiff sued on the 1941 contract; that that contract was superseded by the 1943 contract; that recovery was had under the 1943 contract; that it was error to permit the amendment to conform to the proof; that plaintiff cannot sue on one contract and recover on another; that the amendment pleaded an entirely different cause of action than that pleaded in the original complaint. These arguments all lack merit. It is quite clear that the 1943 contract was not an entirely new, distinct and different contract from the 1941 contract. Both agreements concerned and related to the same transaction. The 1943 contract, at most, simply modified several of the terms of the 1941 contract. Thus the 1943 contract modified the 1941 contract by extending the time of delivery one day, changed the price for 1943-1944 deliveries from 5 cents to 7½ cents, and changed the type of vinegar from 59½ grain to 60 grain. It could be argued that the second contract was but an accord and that therefore the old obligation remained in force until the new one was performed. Civil Code, §§ 1521–1523; see discussion and cases collected 1 Cal.Jur. p. 132, § 8. Since the new contract was never performed the respondent had the right to sue on the original contract and recover damages for its breach. Even if the 1943 contract constituted a novation it would only extinguish the original obligation if the parties so in-

tended. Civil Code, §§ 1530, 1532. Here the terms of the second contract recognized that the first was still "in force." The parties clearly evidenced their intent that the obligations under the former contract were to be extinguished only by performance of the second one—not by the mere execution of the second one.

[6] The most that can be claimed for defendant's position is that the second contract modified the first, but it cannot be doubted that the second was clearly within the scope of the first. It follows that the amendment to conform to proof did not plead an entirely different cause of action from that originally pleaded. At most there was but one cause of action imperfectly pleaded in the original complaint. Gray v. Janss Investment Co., 186 Cal. 634, 200 P. 401; Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53. Under such circumstances it was clearly within the discretion of the trial court to permit the amendment to conform to the proof. Section 469 of the Code of Civil Procedure provides that: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended upon such terms as may be just." Section 470 provides: "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

[7-10] The allowance of amendments to conform to the proof rests in the sound discretion of the trial court. An abuse of discretion is not shown unless prejudice appears and unless new and entirely different issues are thus brought into the case. The greatest liberality is encouraged in this respect. See collection of cases 21 Cal.Jur. p. 209, § 143. It must be remembered that the purpose of pleadings is to fairly inform the parties of the nature of the cause of action or the defense. It is not to create traps to ensnare the unwary. Where a case is fully and fairly tried, where all relevant issues are fully developed, and where both sides have a full and fair opportunity to present all relevant evidence on the pertinent issues a cause will not be reversed simply because the pleadings fail to fully disclose all of the related issues. Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687.

In the instant case defendant was in no way prejudiced by the amendment. It knew of the modification—in fact, it pleaded the 1943 contract in its answer. The 1943 contract was introduced into evidence early in the proceedings, and defendant was given a full and fair opportunity to refute all issues raised thereby. Defendant cross-examined plaintiff's witnesses at length on the 1943 contract. Defendant was in no way misled or prejudiced by the amendment. See Peters v. Binnard, 219 Cal. 141, 25 P.2d 834; Karlik v. Peters, 106 Cal.App. 126, 288 P. 863.

[11] The defendant contends that there is no evidence to support the finding that it breached the 1943 contract. It urges that the evidence shows that it was willing to sell the vinegar at 7½ cents a gallon after learning that its request for an increase would not be granted. In this connection reliance is placed upon the evidence that after the filing of this action it tendered some 2,700 gallons at 7½ cents per gallon but that plaintiff refused to accept it. The evidence heretofore set forth clearly refutes this contention. The testimony of plaintiff's attorney shows without ambiguity that defendant refused to perform and repudiated the contract unless an increase was granted. This repudiation, whether regarded as a present breach of an existing obligation to perform or as an anticipatory breach of an obligation which defendant had several months in which to complete performance, could not be retracted by the tender of 2,700 gallons made after suit was brought. It is well settled law that in cases of anticipatory breach the bringing of suit is a sufficient election to treat the repudiation as a breach and to prevent its retraction. 5 Williston on Contracts, Rev.Ed., p. 3723, § 1323; Restatement of Contracts, §§ 318, 319.

[12-14] The defendant next urges a series of arguments relating to a claimed duty on the part of respondent to mitigate the damages. It is first urged that plaintiff should have accepted the 2,700 gallons tendered, and that it was error to allow damages based on the difference between the 7½ cent contract price and the 10 cents demanded on this gallonage. While it is true that there is a duty on the part of the innocent party to minimize damages (see discussion 5 Williston on Contracts, Rev.Ed., p. 3875, § 1385), and while this duty may, in some cases, include the duty to buy from the defaulting seller at a demanded higher price on penalty of having damages limited accordingly (Sargent v. North End Water Co., 190 Cal. 512, 213 P. 33; Severini v. Sutter-Butte Canal Co., 59 Cal.App. 154, 210 P. 49; Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 P. 1135; Mabb v. Stewart, 147 Cal. 413, 81 P. 1073), such duty does not extend to the compulsion of accepting at even the contract price less than the quantity specified in the contract where, as here, the circumstances show there was no intention to deliver the balance, at least where suit is filed before such imperfect tender. Section 1764, Civil Code; 2 Williston on Sales, 2d Ed., p. 1495, § 599 g; 5 Williston on Contracts, Rev.Ed., p. 3877, § 1386. Here, under the evidence most favorable to plaintiff, it reasonably can be inferred that the tender of the 2,700 gallons was not in good faith; that it was made to gain an advantage in the impending trial; and that no further vinegar would be offered at the contract price.

[15] It is next urged that the trial court erred in computing damages on the balance of the undelivered gallonage at the difference between 7½ cents a gallon and 10 cents a gallon. It is contended that plaintiff could have purchased this gallonage from defendant on a sliding scale at an amount averaging below 10 cents a gallon, and that the damages computed by this sliding scale would not exceed $6,360.35 instead of the $8,610.35 allowed by the trial court. The argument is unsound for several reasons. The sliding scale offer was made only on condition that it be accepted in lieu of all outstanding obligations. As already pointed out there had been violations of the original contract. Plaintiff could not be compelled to waive rights under the original contract. See 5 Williston on Contracts, Rev.Ed., p. 3795, § 1353; p. 3875, § 1385. Moreover, it would appear that the damages allowed were substantially less than could have been allowed. No allowance for loss of profits, or the difference between the contract price and the market price, were allowed, as well might have been done. While plaintiff has not appealed, this factor is important in ascertaining whether the damages allowed were excessive. Here the evidence shows that defendant had the full gallonage on hand to fulfill its obligations under the contract, and that at the time of repudiation the price had gone up to 20 cents a gallon. Thus, with damages limited as they were to the difference between the contract price of 7½ cents and the 10 cents demanded, it is a reasonable inference that even with the payment of damages here allowed defendant made money on the deal. The damages, far from being excessive, were, if anything too small. Defendant is in no legal position to object to the amount awarded.

[16] The last contention of defendant needs but scant mention. It is urged that in fact it was plaintiff who breached the contract because, so it is contended, the parties by their prior dealings had placed the practical construction on their contracts that the price fixed therein was subject to change. In this connection reliance is placed on the evidence that in 1941 the parties orally agreed to raise the price from the original 5 cents a gallon to 6 cents, in 1942 orally agreed to fix the price at 7½ cents per gallon, and in 1943 fixed the price in writing at 7½ cents per gallon. The argument is without merit. The rule of practical construction cannot be so applied, certainly not as a matter of law. To say that, because one of the contracting parties agrees, on several occasions, he will pay a higher price than is provided in the contract, he is forever barred as a matter of law from insisting on performance in accordance with the clear, unambiguous terms of the modified con-

tract, is to urge a rule of law that would penalize fair dealing and kindness of heart. At most, the evidence or prior modifications was evidence of the parties' intent, but certainly not conclusive evidence. The trial court has determined this issue against defendant and it's finding cannot be disturbed.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

FUENTES et ux. v. TUCKER et al.

NEGRETTE et ux. v. TUCKER et al.*

Civ. 15383, 15384.

District Court of Appeal, Second District, Division 1, California.

Dec. 30, 1946.

Hearing Granted Feb. 27, 1947.

1. Death 🔑99(3)

An award of $7500 each for death of two twelve year old boys who were shown to have had good habits and to have been in good health was not excessive.

2. Appeal and error 🔑1052(5)

Admission of testimony that defendant had been drinking at time his automobile struck plaintiffs' decedent, though defendant had admitted liability, did not constitute prejudicial error on ground that only purpose it accomplished was to increase damages by putting jury in a punitive state of mind, where it was obvious from verdict rendered that jury was not influenced to any great extent by evidence complained of.

3. Courts 🔑2

Presence of wife as joint plaintiff in husband's action for wrongful death of son would at most constitute misjoinder, and would not go to court's jurisdiction. Code Civ.Proc. §§ 376, 378, 434.

4. Parties 🔑92(4)

Alleged misjoinder of wife in husband's action for wrongful death of son should have been objected to by special demurrer, where facts showing misjoinder appeared upon face of complaint, and was waived by failure to object either by demurrer or answer. Code Civ.Proc. §§ 376, 378, 434.

5. Appeal and error 🔑1169(1)

Where clear right of action for wrongful death of son was stated in father as plaintiff, judgment would not be reversed on ground of misjoinder of mother as plaintiff, but proper remedy would be by dismissal as against the unnecessary party. Code Civ.Proc. §§ 376, 378, 434.

6. Death 🔑31(7)
Parent and child 🔑7(6)

The purpose of statute authorizing father to sue for injury or death of child was to designate the necessary party plaintiff in order that defendant might be protected against multiplicity of actions and that finality of litigation might be assured. Code. Civ.Proc. § 376.

7. Death 🔑42
Parent and child 🔑7(6)

The statute authorizing father to sue for injury or death of child does not eliminate the joining of a proper party with the necessary party to the action. Code Civ. Proc. § 376.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Consolidated wrongful death actions by Pablo Fuentes and Carmen Fuentes, husband and wife, against Clarence L. Tucker and others, and by Andres L. Negrette and Mariana Negrette, husband and wife, against same defendants arising out of an automobile accident. From judgments for plaintiffs, the named defendant alone appeals.

Affirmed.

Parker, Stanbury & Reese and White McGee, Jr., all of Los Angeles, for appellant.

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* Subsequent opinion 187 P.2d 752.

V. P. Lucas, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is a consolidated appeal by defendant Tucker from judgments rendered against him in the above entitled actions. Both actions are for wrongful death arising out of an accident which occurred on November 22, 1944, when an automobile operated by appellant struck two pedestrians, Raymond Negrette and Richard Fuentes, the minor sons of the respective respondents. The jury's verdict awarded $7500 to the parents of each child.

Before the jury was impaneled, appellant filed an amended answer by leave of the court in which he admitted "that he was and is liable for the death of the deceased * * * and the damages directly and proximately caused thereby." Thereafter, appellant moved to exclude all evidence relative to the circumstances surrounding the accident, particularly that appellant had been drinking prior thereto, on the ground that such evidence would be immaterial and irrelevant to the issues presented by the pleadings. Said motion was denied.

It is here contended that the admission of such evidence was prejudicially erroneous, for the reason that, having admitted liability, there remained for determination the question of damages alone, and the only purpose accomplished by admitting the evidence complained of "was to increase the damages by putting the jury in a punitive state of mind."

The trial court's ruling on the motion of exclusion was based upon Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246, and Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603, 604, which cases are cited by respondents in support of the judgments here in question.

Rowe v. Rennick was an action for damages for personal injuries suffered in an automobile collision alleged to be due to the negligence of defendant. "After the jury had been impaneled, and, before any opening statement had been made, counsel for the defendant made the following statement: 'Mr. Raines: Your Honor, before counsel proceeds, I think it is now in order for the defendant, under the conditions here, to make a statement as to his position, that is, as to the position of the defendant Rennick, so that it will expedite the matter and clarify the issues to be presented to the jury in this case. The defendant, of course, is charged with negligence; we are admitting, what we call admitting, liability in this action; we are admitting responsibility for the accident itself, which, under the conditions, will limit the question to go to the jury as to the amount of damages to be awarded the plaintiff. I make this statement at this time so that this may guide counsel and ourselves in making the statement and the conduct of the case itself.' Following this admission on the part of the defendant, counsel for the plaintiff made an opening statement detailing the facts and circumstances of the collision, and then introduced testimony to prove the facts and circumstances as outlined in the opening statement. To all of these matters the defendant interposed timely and appropriate objections, which the court overruled."

The court, in the cited case, stated (112 Cal.App. at page 579, 297 P. at page 604): "It will be noted that the defendant did not admit the facts and circumstances resulting in the collision. The admission is only, in the language of counsel, 'what we call admitting liability in this action; we are admitting responsibility for the accident itself.' This, under the settled law of this state, does not preclude the plaintiff from introducing testimony to substantiate the allegations in the complaint."

Said court then called attention to the case of Martin v. Pacific Gas & Elec. Co., 203 Cal. 291, 264 P. 246, supra, in which "The defendant attempted, by an admission, to narrow the issues to the simple question of the amount of damages to be awarded, and made there, just as we have here, a limited admission of responsibility. The Martin Case, however, presented a much broader question than that tendered upon this appeal. This will appear by a reference to the Martin Case as reported in [the opinion of the District Court of Appeal,] (Cal.App.) 255 P. 284, where the facts contained in the transcript are set forth at length. There, the court permitted the testimony to be admitted detailing the facts and circumstances of previous acts of negligence, extending over a considerable period of time. This court held the admission of such testimony to be erroneous. In the hearing had in the same case by the Supreme Court it appears that a majority of the court agreed with the holding of this court as to the error in the admission of such extraneous matters, but it also held that the admission of such testimony was not of such a prejudicial character as to warrant a reversal, as judgment only could, under the circumstances of the case, go in favor of the plaintiff. What is said by the Supreme Court in the Martin Case, supra, however, is directly in point in this case, where only the circumstances surrounding the immediate act of negligence was testified to by the witnesses. We quote from the opinion the following: 'Indeed, it never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it. "It does not lie in the power of one party, however, to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the Presiding Justice in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts, to present to the jury a picture of the facts relied on. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances." 26 R.C.L., § 40, p. 1046; Dunning v. Maine Cent. R. Co., 91 Me. 87, 39 A. 352, 64 Am.St.Rep. 208. The fact that the evidence admitted might, as an identical feature thereof, be inflammatory or have a tendency to unduly arouse the jury, does not render such evidence inadmissible. In Mohn v. Tingley, 191 Cal. 470, 491, 217 P. 733, 742, it is said: "The chief objection to all the evidence of which complaint is made is that it served to stir up the prejudice of the jury and arouse sympathy in respondent's favor. But the evidence being admissible, its effect upon the jury would furnish no reason for its rejection." Likewise no prejudicial error can be committed by reading the pleadings to the jury, even though the legal effect of them has been admitted. Knight v. Russ, 77 Cal. 410, 414, 19 P. 698. We therefore hold that the said attempt of counsel to limit the proof was abortive and the trial court committed no error in its rulings in respect thereto.'

"To the same effect we may cite the following: Jones v. Allen, [8 Cir.,], 85 F. 523; [5] Wigmore on Evidence, (2d Ed.), vol. 5, p. 607, § 2591; People v. Fredericks, 106 Cal. 554, 39 P. 944; Lesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78, 137 N.W. 663; Thomson v. Carruth, 218 Mass. 524, 106 N.E. 159."

Appellant calls attention in his opening brief to the testimony which he urges was erroneously admitted and constituted an attempt by respondents to prejudice the jury and thereby increase the measure of damages, to-wit:

"Evidence was introduced that the decedents were knocked or carried by the defendant's car a distance of 80 or 90 feet, and that the defendant said, 'this is certainly a terrible thing.' * * * that the decedents were in a crosswalk and had crossed to the center of the street when the collision took place and that one of the boys was knocked through the air."

Appellant particularly objects to the testimony with respect to his intoxication which was given by police officer Skeen in answer to questions propounded by respondents' counsel, to-wit:

"Q. All right. Now, what did the defendant say to you and what did you say to him? A. The first time I saw him I asked for the driver of the car—that was after the ambulance had left—and Mr. Tucker identified himself to me as being the driver. We, in turn, walked over to the side of the police car, and I asked him for his driver's license; and then he started to find his driver's license, and after about two minutes of looking, why, he couldn't find it, so I turned and walked back to the center of the street where Officer Hamilton was, and then I walked down to the west curb line of Cabrillo, where I was looking for witnesses. Now, I had no further conversation other than asking for the driver's license at that time.

"Q. All right. Now, did you have any further conversation than that which you have already related there at the scene of the accident? A. I don't recall having any further conversation with Mr. Tucker at that time, no.

"Q. All right. Now, will you tell me—describe to the jury—the physical appearance of the defendant at the time when you were speaking to him regarding his driver's license? A. Mr. Tucker had been drinking.

"Q. Well, now, I expect that that is a conclusion, counsel. What made you—what did you see, hear, taste, or smell, that gave you that idea? A. He had an alcoholic breath.

"Q. All right. A. And when I asked him for his driver's license he started looking through his wallet and he fumbled and fumbled. He pulled one card out three times, a white card, thought that was his driver's license. * * * (Objection to what he thought was sustained, and that portion of the answer was stricken.) The Witness: After approximately two minutes of trying to find his license I gave up and walked back out to the center of the street where Officer Hamilton was.

"Q. By Mr. Lucas: All right. Now, did you see the defendant walk? A. I did.

"Q. And what did you observe with respect to his walking? A. It was kind of a swaying motion, unsteady on his feet."

With respect to the testimony of Officer Hamilton, appellant states: "Since the principal questions asked him on direct examination concerned the intoxication of defendant, it is obvious that the sole purpose of calling him as a witness was to establish that fact. His entire testimony on direct examination was" as follows:

"By Mr. Lucas: Q. What is your occupation, Mr. Hamilton? A. Police officer, City of Los Angeles.

"Q. And how long have you been such? A. Two and a half years.

"Q. And on November 22nd, 1944, to what division of the police department were you attached? A. Accident investigation.

"Q. And at what place? A. San Pedro division.

"Q. Now, on that day did you get a call to investigate an accident? A. Yes, sir.

"Q. And where was that accident? A. At Ninth and Cabrillo.

"Q. And at or about what time of the day was it? A. It was approximately 7:00 p. m.

"Q. Now, Officer Hamilton, when you arrived at the scene of the accident did you see an automobile that was involved in the accident? A. Yes, sir.

"Q. And did you see anyone that was the driver of that car? A. Slightly after we arrived at the accident, yes, sir.

"Q. And who was the driver of the car? A. Mr. Tucker.

"Q. And will you tell me, Officer Hamilton, approximately where the car—well, I withdraw that. Did you determine the car that was involved in the accident? A. Yes, sir.

"Q. And can you go to the blackboard there and tell us approximately the location of the car? A. Well, this is the approximate location of the car as shown on the diagram at the present time.

"Q. I see. All right. Now how soon after you got there did you talk to Mr. Tucker? A. Oh, it was approximately twenty minutes after we arrived at the scene.

"Q. And on that occasion where did you talk with him?—at what point around the scene of the accident? A. It was over on the northwest corner by the police car, where we had parked our car at that time.

"Q. And who was with you at that time? A. Well, there was a large crowd around there; I couldn't name anyone right offhand.

"Q. I mean in your and Mr. Tucker's immediate presence. A. Officer Skeen was there for a while, and who else was there I couldn't answer that.

"Q. I see. Now, on that occasion did you smell the breath of the defendant? A. I did.

"Q. State whether or not it was alcoholic? A. It was alcoholic.

"Q. And will you describe his speech? A. Well, it was rather confused, slightly slurred—not too much.

"Q. Did you examine his eyes? A. Yes, sir.

"Q. What was the examination and what was the result? A. Well, the examination consisted of a flashlight on the pupil of the eyes, and the eyes reacted slowly on light. They were really dilated, more or less.

"Q. What was the appearance of the eyes? A. Bloodshot.

"Q. And did you observe the defendant's gait in walking? A. Yes, sir.

"Q. What was that? A. Unsteady.

"Q. In your opinion at that time was he under the influence of intoxicating liquor? A. He was.

"Q. Now, at that time did you have any conversation with the defendant with respect to whether or not he had been drinking liquor? A. Very slight, yes, sir.

"Q. Well, state that conversation. A. Well, he—while filling out our sobriety form he stated that he had had four or five glasses of wine at his home at approximately 5:30 that evening, five to five-thirty that evening, I believe.

"Mr. Lucas: You may cross-examine."

Raymond Negrette, at the time of his death, was 12 years, 7 months and 15 days old; he was in the fifth grade at school; had a paper route, as the result of which he had saved about $80; he was a member of the Boys Club of San Pedro, and acted as a school crossing guard and aided and directed other children at the school crossing; he was in good health, was studious and obedient; he had lived with his parents from the time of his birth until his death, and was an only son, being survived by three sisters.

Richard Fuentes was 11 years and 11 months at the time of his death; he, with his younger brother and Raymond Negrette, was on his way to the Boys Club at the time of the accident. He was in the fifth grade at Mary Star of the Sea, a parochial school located about a block from the site of the accident. He was in good health, and did the usual chores and work around the home usually done by boys of his age. He had been instructed as to the proper care and caution to be used in crossing a street; and had resided with his parents all of his life.

[1] Appellant urges that the verdicts of $7,500 each, were excessive; that "Neither of these boys was self-supporting, and neither contributed to the support of their parents. There was no evidence that they had special talents or aptitudes", and that the significance of the erroneous admission of the irrelevant evidence is magnified, when considered in the light of the large verdicts here rendered.

A recovery of $12,000 was allowed for the death of an eighteen year old boy in House v. Pacific Greyhound Lines, 35 Cal. App.2d 336, 95 P.2d 465; an award of $10,000 was given for the death of a seventeen year old girl in Casselman v. Hartford, etc., 36 Cal.App.2d 700, 98 P.2d 539; and in O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, a jury's verdict for $10,000 was sustained for the death of a seven and a half year old boy.

By comparison with the foregoing awards, it can hardly be said that the verdicts of the jury in the instant actions were excessive, or that the jury was unduly influenced by the so-called inflammatory evidence, to the introduction of which appellant so strenuously objected.

[2] While it is elementary that an admitted fact need not be proved, attention has not been directed to any adjudication holding that the admission of evidence in proof of an admitted fact is of such a prejudicial character as to warrant a reversal of a judgment.

Because it is obvious that the jury herein was not influenced to any great extent by the evidence complained of, appellant was not prejudiced by its introduction, and therefore the principles of law enunciated in Martin v. Pacific Gas & Electric Co., and Rowe v. Rennick, supra, are applicable to the situation here presented.

[3-7] Appellant urges that the mothers of the decedents were erroneously joined as plaintiffs, because under section 376 of the Code of Civil Procedure, the right to maintain an action for the wrongful death of a minor is given exclusively to the father, if he is living. In his fourth affirmative defense, set up in his first amended answers to the complaints herein, appellant alleged that the mothers were not proper parties plaintiff and did not have a cause of action individually.

In House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 343, 95 P.2d 465, 469, where the same point was raised, the court stated: "The presence of the wife as joint plaintiff would at most constitute a misjoinder and as all of the facts appeared upon the face of the complaint, objection should have been taken by special demurrer. No such demurrer was filed. In the original answer no objection was made to the presence of the wife as a party plaintiff. In the amended answer a special cause of action was set up alleging that the court had no jurisdiction of the subject-matter of the action in so far as it related to an alleged cause of action in favor of plaintiff, Samie G. House (the wife). Legal incapacity of the plaintiff to sue would not go to the jurisdiction of the court. Rosenbloom v. Southern Pac. Co., 59 Cal.App. 102, 210 P. 53; Crittenden v. Superior Court, 166 Cal. 340, 136 P. 287; Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L.R.A.,N.S., 581. So it would appear defendant had failed to raise the objection, if any, either by demurrer or answer and not having been so raised it must be deemed waived. Rosenbloom v. Southern Pac. Co., supra; sec. 434, Code Civ.Proc. But, assuming, however, that that issue was properly presented, we still believe that defendant is not entitled to a reversal. The purpose of section 376 of the Code of Civil Procedure was to designate the necessary party plaintiff in order that a defendant might be protected against multiplicity of actions and that a finality of the litigation might be assured. Here the father was a necessary party and as such he was made plaintiff. Section 378 of the Code of Civil Procedure provides that:

"'All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist. * * *.'

"Section 376 of the Code of Civil Procedure would not in effect eliminate the joining *a proper* party with *the necessary* party to the action." (Emphasis added.)

An examination of the entire record discloses no miscarriage of justice in these cases.

For the reasons stated, the judgments appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

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77 Cal.App.2d 560

PEOPLE v. TUCKER.

Cr. 2397.

District Court of Appeal, First District,
Division 1, California.

Jan. 8, 1947.

1. Robbery 🔑24(1)

Evidence sustained robbery conviction.

2. Criminal law 🔑1169(7)

In robbery prosecution, statement of one of three defendants, when their consolidated cases were called and before jury was impaneled, that his lawyer had wanted him to plead guilty, was not prejudicial to codefendant, where evidence against defendant was overwhelming, and codefendants used only one peremptory challenge. Pen.Code, § 1098.

3. Criminal law 🔑1169(5)

Admission of statements of defendant on cross-examination by prosecution relating to statements made to police implicating codefendant, and made in absence of codefendant, was not reversible error as to codefendant, where prosecution before cross-examination conceded that the statements to the police were hearsay as to codefendant and would be binding only on defendant who made the statements and court instructed jury that rights of codefendant were not to be affected by statements.

4. Criminal law ⚿422(9)
Witnesses ⚿323

In robbery prosecution against three defendants, prosecution could introduce evidence of admissions or statements claimed to have been made by one defendant against that defendant and could cross-examine that defendant in detail as to the statements when he sought to repudiate them.

5. Criminal law ⚿422(6)

In robbery prosecution against three defendants, admissions or statements of one defendant not made in the presence of another were inadmissible as to the absent defendant and were not binding upon him.

6. Criminal law ⚿1144(15)

On appeal District Court of Appeal must assume in absence of the contrary showing that the jurors heeded the instructions of the trial court.

7. Criminal law ⚿730(11)

In robbery prosecution against three defendants, district attorney's argument to effect that reason prosecution had not called one defendant, who had pleaded guilty after prosecution's opening statement, was because prosecution had not believed that defendant, and because case did not require the testimony of such an unreliable witness, and that prosecution would not expect the jury to believe him even though he admitted that other two defendants were his pals, was not prejudicial where court ordered statement stricken and instructed jury to disregard it and also instructed jury that arguments and statements of counsel were not to be regarded as evidence.

8. Criminal law ⚿1171(1)

Each case of an attorney's misconduct during trial of case must be judged by its own particular circumstance, and before a judgment is reversed on ground of attorney's misconduct it must appear that the misconduct reached the point where injustice resulted to the defendant.

9. Criminal law ⚿730(1)

Generally misconduct of district attorney will not suffice to justify granting of a new trial if, upon the whole case, it can be said that possible effect thereof was subsequently removed by a proper admonition of trial court to jury.

10. Criminal law ⚿822(1)

Instructions of trial court must be taken as a whole.

11. Criminal law ⚿822(1)

In robbery prosecution, instruction that importance of jury's duties required consideration of the right of the people to have laws properly executed and that, unless jury did its duty, laws might as well be stricken from the statute books, was not error as conveying meaning that laws might as well be stricken from the statute books unless the defendant was found guilty, where from the instructions as a whole it was apparent that no such impression could be gained by the jury.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Wardell Tucker, Leonard Thompson, and Chester Harris were convicted of robbery, and Wardell Tucker appeals.

Judgment affirmed.

Carl E. Brown, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Alvin E. Weinberger, Asst. Dist. Atty., both of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Appellant Tucker was charged by the information with the crime of robbery.

It was alleged that he, on or about August 9, 1945, did unlawfully take from the person and presence of one Glen B. Roberts, $4,000. He was alleged to be one of three colored men who, about 2:45 a. m. on August 9, 1945, held up and robbed the Municipal car barn at McAllister Street and Masonic Avenue, San Francisco, of approximately $4,000 in cash and 10,000 street car tokens. The other two men accused were Leonard Thompson and Chester Harris, and the trials of all three were ordered consolidated by the court. After the jury was selected, Harris changed his plea to guilty and the trial proceeded as to Thompson and Tucker. The jury found both of the defendants guilty of robbery in the first degree. The court denied the appellant's motion for a new trial. From the judgment sentencing appellant Tucker to imprisonment in San Quentin for the period prescribed by law, this appeal is taken.

At the time of the robbery Glen B. Roberts, the acting dispatcher, and Velma Major, a conductorette, were in the car barn. Roberts was working in the cashier's office while Mrs. Major was in the gilley room making up her account. The cashier's office is on the north side of the gilley room and is separated from it by a glass frame partition. In the center of this south wall of the office is the dispatcher's window.

Roberts testified that at approximately 2:43 a. m. on August 9, 1945, and while he was standing at the dispatcher's window, a colored man (identified as Harris) came up and asked him what time he could get a street car down town. After receiving his answer he started away, and as Roberts started to turn around another colored man (identified as defendant Thompson) stuck a gun in his back and grabbed him around the neck with his arm. Roberts lost his balance and was made to lay flat on his stomach with his hands out in front of him. His wrists were then taped together by Thompson. Thompson evidently had got in through the west door, and Thompson then opened the east door to the cashier's office and defendant Harris came in. These two men then began throwing the money bags into a large canvas satchel. The money, together with 10,000 tokens, was carried outside. They made several trips for this purpose. They also removed a double-barreled shotgun. Roberts could not say there was a third man present during the robbery.

However, the witness Mrs. Major testified as follows: She had completed her run at 2:11 a.m. She then took her fare box into the gilley room to fix her accounts. As she stood working at a table, and at approximately 2:31 a. m. a colored man came in through the sliding door in the south wall of the gilley room. His face was painted. He passed out of sight behind some lockers. She continued to count her money and then another colored man (identified as Harris) came in and began to speak to the dispatcher. He asked about getting a car downtown and then thanked the dispatcher and turned to leave the building. At this time a third colored man entered the gilley room through the sliding door on the south wall. This man told her to get on the floor. She didn't say anything; she looked at him, because it was something unusual to her. He said: "I told you to get on the floor," and pulled a gun out of his pocket, and put it on her and told her to get on the floor, and she then got on the floor. She identified this third man as the defendant and appellant Tucker. She lay on the floor approximately a minute or so and then sat up on the floor. She could see two men moving backward and forward in the office, but could not tell what they were doing as the walls were high. She saw them as they left through the gilley room. She identified them as defendants Harris and Thompson. She also testified that Tucker kept his gun on her as long as the other two men were in the office, about five to seven minutes. Tucker had no paint on his face and there was no doubt in her mind as to his identity. After she sat up on the floor she could see Tucker at all times. After the defendants were arrested, Mrs. Major was called to the Hall of Justice. She was shown three photographs and identified Tucker's. She was also shown Tucker. He was brought out alone and the police asked her if this was the man. She then identified him as the man who held the gun on her. There was no doubt in her mind as to his identity.

Appellant Tucker denied any complicity in the robbery, and claimed that he was in Bakersfield on the night in question. He produced four witnesses whose testimony was to the effect that Tucker was in Bakersfield on the night of the robbery. However, a reading of the testimony of these witnesses discloses an element of uncertainty on their part as to the exact date that they saw appellant in Bakersfield, and their testimony was no doubt rejected by the jury because of the positive identification of appellant by Mrs. Major and the other testimony.

[1] Appellant urges numerous grounds for a reversal of the judgment, the first of which is that the evidence is insufficient to support the verdict of guilty. In view of the evidence hereinbefore set forth, and without detailing any of the additional evidence in the record, it is clear that this contention is without merit. The testimony of Roberts and of Mrs. Major is in itself sufficient, and in the face of such testimony it cannot be said that the verdict of the jury was without substantial support in the record. As was said in People v. Quinn, 12 Cal.App.2d 752, at page 754, 55 P.2d 1277, at page 1278: "Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution * * * provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ. Proc., § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive. (Code Civ. Proc., § 2061.)"

Appellant next contends that he was prejudiced at the outset of the trial by improper proceedings in the presence of the jury panel. When the cases were called and before the jury was impaneled the trial judge stated that he understood that defendant Thompson did not want his attorney to represent him further, and Thompson confirmed this. There was then some discussion as to the appointment of the public defender to represent Thompson and the record then shows the following:

"The Defendant Thompson: As it was, my lawyer here wanted me to plead guilty—

"The Court: No, don't make any statement, as long as you don't want him to represent you.

"The Defendant Thompson: I would like to engage an attorney if there is any way possible.

"Mr. Anderson: May I suggest we adjourn to chambers for a moment?

"The Court: Well, all right, no objection, with the reporter.

"Mr. Anderson: I will waive the presence of the defendant.

"The Court: How about yourself, will you waive being present?

"The Defendant Thompson: Yes."

Counsel for appellant Tucker thereupon, in the court's chambers, moved the court to dismiss the panel upon the ground that the jury in so many words was told that Thompson's lawyer wanted him to plead guilty and that such statement would prejudice the minds of the jury against Thompson's codefendant, the appellant Tucker. The trial judge denied the motion to discharge the panel, stating that he would instruct the jury that the appellant had pleaded not guilty, that he was presumed to be innocent and that the jury were to carry with them the presumption of appellant's innocence until the jury determined the issues of fact presented. Court and counsel then returned to the court room and the jury was selected.

[2] Appellant argues that the quoted statement by Thompson would impress the lay mind even before the hearing that Thompson was guilty, and, since the three defendants were charged jointly, the effect would be to impress the jury that appellant Tucker was also guilty, and that, therefore appellant was compelled to enter upon the trial under a handicap that would prevent him from having a fair trial. Included in the instructions given to the jury were the following: that the appellant had entered a plea of not guilty; that he was presumed to be innocent; that unless his guilt was proven beyond a reasonable doubt he was entitled to an acquittal; that he was to be tried only upon the evidence that was before the jury. Appellant argues, however, that such instructions could not remove the prejudicial effect of the statement by Thompson in the presence of the jury panel and that the trial court erred in denying his motion for the dismissal of the panel.

A reading of the entire record shows that the evidence against Thompson was overwhelming, so that it is difficult to understand how appellant Tucker could have been prejudiced by the mere statement by Thompson that his attorney wanted him to plead guilty. Furthermore, the record shows that while the three defendants were entitled to ten peremptory challenges to be exercised jointly, and also five additional peremptory challenges each (Penal Code, sec. 1098) only sixteen members of the panel were examined and only one peremptory challenge was exercised by the defendants, either jointly or individually, which indicates to us that appellant must not then have considered the statement of Thompson as prejudicial as he now claims it to have been. While the trial court might well have granted the motion to dismiss the jury panel, we cannot hold, upon the record here, that his denial of the motion was either erroneous or prejudicial.

Appellant's third contention is that he "was prejudiced by the cross-examination of defendant Thompson as to his alleged confession." Inspector Doherty on direct examination testified that after Thompson's arrest he questioned him; that he asked Thompson about the holdup and Thompson stated "he participated in this robbery with Chester Harris and Tucker and that at the time of the other robbery they took the shotgun out of the car with this money and Tucker held up the girl and that he and Harris packed the money in and out to the car. * * *" Appellant Tucker's attorney objected to such testimony with reference to Tucker. The court sustained the objection and the district attorney stated he would have no objection to having it excluded as to defendant Tucker, so far as naming accomplices.

After this the defendant Thompson testified that these statements were obtained from him by physical abuse and under a promise that his common-law wife, with whom he was arrested, would be released and they would be allowed to marry and finally that there was no truth to these statements but he merely gave them so as to effect the release of his woman; that actually the answers were those of the police rather than his own. Thompson never signed the statements.

The district attorney on cross-examination of Thompson then went through the statement taking each question and answer and asking Thompson whether such was his answer or that of the police. In some of such answers Tucker was implicated as being a participant in the crime.

However, before such procedure took place the district attorney conceded that such statements would as to defendant Tucker be hearsay and would be binding only on defendant Thompson. The court agreed. Practically every time Tucker's name was mentioned, it was either stipulated that as to defendant Tucker it was not binding and hearsay or the objection to such evidence as against Tucker was sustained. At one point the following occurred:

"Mr. Weinberger [assistant district attorney]: I would suggest that the jury be admonished that in any case these are admissible only as against this particular defendant, and not as against the defendant Wardell Tucker.

"The Court: Yes, I think the jury so understands. In other words, this witness cannot testify to things that did not occur in the presence of Tucker, and these things are admittedly not in the presence of Tucker, and not intended to be binding on the defendant Tucker * * *."

[3-5] It was, of course, proper for the People to introduce evidence of admissions or statements claimed to have been made by Thompson as evidence against him and it was likewise proper to cross-examine Thompson in detail as to said statements when he sought to repudiate them. Such statements of Thompson not in the presence of appellant Tucker were, of course, inadmissible as to him and not binding upon him, and the jury was so informed not once but many times. The rights of appellant were as well protected as it is possible to protect a codefendant in a criminal case against statements or admissions made by his codefendant. The jury was carefully and correctly instructed in this regard and we must assume in the absence of a contrary showing that the jurors heeded the instructions of the court. In People v. Burdg, 95 Cal.App. 259, at page 268, 272 P. 816, at page 820, the court said: "It is true, the prosecution was allowed to introduce in evidence at the joint trial extrajudicial declarations made by the respective appellants out of the presence of the other, but this situation of itself does not give defendants jointly charged the absolute right to separate trials, because if such were the rule then in no case could there be a joint trial when part of the evidence against the joint defendants consisted of extrajudicial statements; furthermore, in the present case, the record discloses that in admitting said declarations the trial court in each instance carefully and properly instructed the jury to the effect that the rights of the absent party were to be in no way affected thereby; and we must presume, in the absence of a contrary showing, that the jury followed those instructions. People v. Prather, 134 Cal. 436, 66 P. 589, 863." See also 4 Cal.Jur.Supp.1943 Rev. 656, sec. 194, and the cases of People v. Matthew, 194 Cal. 273, 228 P. 424; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519; People v. Trotter, 120 Cal.App. 54, 7 P.2d 731; and People v. Walden, 75 Cal.App. 565, 243 P. 25.

[6] The appellant next contends that the district attorney was guilty of prejudicial misconduct in his argument to the jury. In his opening argument the district attorney stated that an attorney who places a witness on the stand in effect vouches for his testimony and said that he had not called Harris (one of the three codefendants who had changed his plea to "guilty," after the jury had been empanelled) as a witness because he did not think that any testimony Harris might give would be worthy of belief. Following this statement, the public defender, who was counsel for Thompson, in his argument referred to the above statement by the district attorney and said that the reason given by the district attorney was not the real reason why Harris was not called by the district attorney as a witness, but that the real reason was that there was an arrangement between Harris' attorney and the district attorney that Harris would not be put upon the witness stand. Then in his closing argument the district attorney replied to the public defender's statement in the following language: "The reason Harris was not called was the reason I gave; but since Mr. White has seen fit to question that reason, I will give you a little more information about what happened to Harris. After the People's opening statement, Mr. Harris, through his attorney, elected to plead guilty; and at the time that he did that, his attorney, in the presence of his Honor, Judge Deasy, said to me, he does not want to be called as a witness; and I said to Mr. Anderson who represented Harris, I won't call him as a witness, I don't need him. And I don't need him, ladies and gentlemen, when we have the type of case we have here. Why rely upon the unreliable testimony of an accomplice. There are cases where such testimony must be relied upon, but this is not one of those cases. And as I said this morning, we did not believe Harris when he was arrested, we did not believe anything he told us before, and I would not put him on the stand and expect you to believe anything that he said, even though he admitted these two men were his pals."

Counsel for appellant then asked that the said statement of the district attorney be stricken and assigned it as misconduct and prejudicial error. The court ordered it stricken and instructed the jury to disregard it. The jury was likewise told by the court in its instructions that the arguments and statements of counsel are not to be regarded as evidence in the case.

[7-9] While it is perhaps debatable as to whether or not the latter statement of the district attorney was within the legitimate scope of argument, we are convinced that, upon the record here, the remarks did not constitute prejudicial error so far as appellant Tucker (who is the sole appellant) is concerned. The following language of the court in People v. Granillo, 140 Cal.App. 707, at page 717, 36 P.2d 206, at page 210, is quite applicable here: "Each case of misconduct must be judged by its own particular circumstances, and before a judgment is reversed on that ground it must appear that the misconduct reached the point where injustice resulted to the defendant. And it is a general rule that misconduct of the district attorney will not suffice to justify the granting of a new trial if upon the whole case it can be said that the possible effect thereof was subsequently removed by a proper admonition of the trial court to the jury, having in mind the presumption that the jury obeyed the court's instruction."

[10] Appellant's final contention is that the court committed prejudicial error in giving the following instruction to the jury: "The importance of your duties requires that you consider the right of the people of the State of California to have the laws properly executed, and that it is with you, citizens selected from the city and county, that finally rests the duty of determining the guilt or innocence of those accused of crime; and unless you do your duty, laws may as well be stricken from the statute books." Appellant argues that this instruction would convey the meaning to the jury that unless they found the defendants guilty laws might as well be stricken from the statute books. Perhaps, if this were the only instruction given, it might be susceptible of such a construction. But the instructions of the court must be taken as a whole, and when the following portions of the instructions preceding and following the language above quoted are read, it is apparent that no such impression could be gained: "You are to be governed, therefore, solely by the evidence introduced in this trial and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, compassion or prejudice. A verdict founded upon sentiments of pity for the accused, or upon public opinion or public feeling, or upon passion or prejudice, or upon conjectures, would be a false verdict and you will not take counsel of them in deliberating upon your verdict. *The importance of your duties requires that you consider the right of the people of the State of California to have the laws properly executed, and that it is with you, citizens selected from the city and county, that finally rests the duty of determining the guilt or innocence of those accused of crime: and unless you do your duty, laws may as well be stricken from the statute books.* You should also keep in mind the importance to the accused of the result of your deliberations and be just to him, as well as to the people of the State of California. Both the public and the defendant have a right to demand, and they so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case, and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be." (Emphasis added)

Furthermore, in the case of People v. Wolff, 182 Cal. 728, 190 P. 22, in which the jury was instructed in the identical language just quoted, the Supreme Court said, 182 Cal. at page 739, 190 P. at page 27: "The defendant argues that the last sentence of the instruction, in effect, directed the jury that they should find the defendant guilty, and if they did not do so they would have neglected their duty. * * * The instructions, and particularly a single instruction, must be considered as a whole. We cannot perceive wherein the court in this instruction in any respect misdirected the jury as to their duty, and we do not think that it could have been understood by the jury as a direction that they would have been neglectful of their duty if the defendant was not convicted."

In view of the foregoing we conclude that there can be no doubt as to the sufficiency of the evidence to sustain the conviction of appellant, that no prejudicial errors were committed, and that the order denying the motion for a new trial and the judgment should be and are hereby affirmed.

PETERS, P. J., and WARD, J., concur.

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77 Cal.App.2d 453

DRUM v. BUMMER et al.

Civ. 15359.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1946.

Rehearing Denied Jan. 27, 1947.

1. Wills 🔑58(2)

Evidence sustained finding that 73-year-old plaintiff was suffering from senile dementia at time he signed agreement and will, and that defendants had induced plaintiff to enter into agreement to make an irrevocable will with defendants as sole beneficiaries, and to make the will, and to place plaintiff's money in a joint account with defendants when plaintiff was incapable of understanding the legal effect of his actions.

2. Appeal and error 🔑1010(1)

A determination of the question of mental capacity will not be reversed where there is substantial evidence supporting the findings or where different inferences might rationally be drawn therefrom, and the finding of the trial court can be overthrown only when totally lacking the support of substantial evidence.

3. Wills 🔑58(1)

Contract induced by defendants, whereby plaintiff was to make will making defendants sole beneficiaries of plaintiff, was not binding upon plaintiff notwithstanding plaintiff was never adjudged incompetent and was not entirely without understanding where the plaintiff at time of making the contract was suffering from senile dementia and did not actually understand the nature, purposes, and effect of the contract.

4. Contracts 🔑92

In determining the effect of contract entered into by an incompetent who had not been adjudged incompetent and was not at time of making contract entirely without understanding, the test is whether the incompetent was mentally competent to deal with the subject before him with a full understanding of his rights, whether he actually understood the nature, purpose, and effect of what he did.

5. Deeds 🔑210

Evidence sustained finding that defendants gave no consideration for a joint tenancy deed between plaintiff and defendants to property for which defendants paid only $50 down payment with balance of purchase price paid out of joint account which plaintiff had created with plaintiff's own money.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Thomas B. Drum against Raymond A. Bummer, Victoria M. Bummer, and Bank of America, and others, for an accounting, to recover possession of certain personal property, and for the conveyance or the purchase price of certain real property in the possession of defendants Raymond and Victoria Bummer, husband and wife. By stipulation of the parties, the Bank of America was dismissed as a party defendant upon its depositing with the clerk of court the amount of a joint bank account in the names of the plaintiff and defendant Raymond Bummer. From judgment for plaintiff, defendants Raymond A. Bummer and Victoria M. Bummer appeal.

Judgment affirmed.

W. Verne Ahrens, of Los Angeles, for appellants.

Fleming & Boyce-Smith and J. E. Patterson, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff brought this action for an accounting, to recover possession of certain personal property, and for the conveyance or the purchase price of certain real property in the possession of defendants Raymond and Victoria Bummer, husband and wife. He alleged that said defendants obtained the property from him while he was mentally incapacitated. Judgment was in favor of plaintiff, and defendants appeal therefrom. (By stipulation of the parties, the Bank of America was dismissed as a party defendant upon its depositing with the clerk of the court $1106.76, the amount of a joint bank account in the names of plaintiff and defendant Raymond Bummer.)

Plaintiff's wife died in March, 1943, at which time plaintiff was 73 years of age. In September, 1943, plaintiff sold his home, which was on 64th Street in Los Angeles, for $6000, and accepted a trust deed thereon in the sum of $3200, payable $32 per month. He continued, however, to occupy a room in the house until November, 1943, when he rented a room in the home of one Mrs. Dodson. In December, 1943, he became ill and Mrs. Dodson called Dr. William Walla. Dr. Walla testified that at that time he did not think plaintiff was "right" mentally, and the next day, at the request of Mr. Dodson, Dr. Walla returned and had plaintiff removed to a hospital, and then a few days later had him removed to a sanitarium. Defendants had known plaintiff and his wife for a number of years, and defendant Victoria Bummer had worked for them. Upon learning of plaintiff's plight, the defendants went to the sanitarium on December 31, 1943. Defendant Raymond Bummer went to see plaintiff and, while there, it was decided that plaintiff would come to live with defendants. Defendant Raymond Bummer told Dr. Walla that he was a friend of plaintiff, and Dr. Walla, who testified that at that time he thought plaintiff was in a mild form of senile dementia and needed some good friend or guardian to supervise him and his affairs, released plaintiff into the custody of defendants about January 3, 1944. On that same day, or the next day, defendant Raymond Bummer took plaintiff to the bank where plaintiff had the sum of $3589.23 on deposit and plaintiff transferred the entire amount to another bank in an account in the names of plaintiff and Raymond Bummer jointly. At the same time plaintiff's safe deposit box was opened and the contents, including a $25 and a $100 savings bond and the trust deed to the property on 64th Street were removed and taken to defendants' home. During the latter part of January, 1944, defendants and plaintiff went to the office of an attorney and defendant Raymond Bummer told the attorney that the parties wished him to prepare a contract which would provide that plaintiff live with defendants for the rest of his life, and in consideration thereof defendants should receive all of plaintiff's property with the exception of the two bonds. On February 2, 1944, the parties returned to the attorney's office and signed the agreement which he had prepared. It provided that defendants should furnish room and board to plaintiff for $50 per month; that Raymond Bummer should not withdraw more than $50 per month from the joint bank account; that plaintiff might withdraw such sums as he might need for his personal expenses; that defendants might terminate the agreement at any time, in which event the $50 monthly payments should be in full satisfaction of all claims against plaintiff; and that in consideration for the continued performance by defendants, plaintiff had made an irrevocable will in which defendants were the sole beneficiaries of his estate, which then consisted of $2529.25 in money and a trust deed in the principal sum of $2986.77. The attorney had also prepared the will referred to in the agreement, and plaintiff signed it the same day the agreement was signed. The attorney's fee of $100 was paid from the joint bank account. During February, 1944, Raymond Bummer paid $50 as a down payment on the purchase price of a house and 2 lots on Springvale Drive, the total price of which was $3250. The balance of $3200 was paid from the joint bank account on February 25, 1944, and a deed to the property was made and recorded in the names of plaintiff and defendants as joint tenants. Thereafter, plaintiff and defendants moved into the house. Defendants caused improvements and repairs to be made which cost approximately $1200, of which amount $800 was borrowed, and plaintiff and defendants signed a note therefor secured by a trust deed on the property. About January 4, 1945, plaintiff left the Bummer household and rented a room elsewhere. When he left, the defendants had possession of his bank book, bonds, trust deed on the property on 64th Street, and certain baggage belonging to plaintiff. Plaintiff employed an attorney who wrote a letter for plaintiff to the defendants demanding that they deliver to the plaintiff all of his property in their possession, that they render an account and stating that any contracts between the parties were rescinded. Defendants did not comply with the demand. At the time of the trial they were still occupying the premises on Springvale Drive.

The court found that prior to January 8, 1944, plaintiff suffered a mental and physical breakdown and was mentally incapacitated to transact his own business; that defendants induced plaintiff to sign the purported agreement and will while plaintiff was suffering from senile dementia and not mentally capable of understanding the acts or the legal effect thereof; that the purported agreement "is void for want of consideration, and for want of mutuality, as well as the mental incapacity of plaintiff"; that there was no consideration to plaintiff from defendants for the joint tenancy deed; that all the money placed in the joint bank account was the property of plaintiff; that defendants made certain repairs and improvements on the joint tenancy property which required the expenditure of $1138.50, $800 of which amount was money belonging to plaintiff; and that defendants received the further sum of $150 from plaintiff without any consideration.

The judgment provided that plaintiff is the sole owner of the real property on Springvale Drive subject to the unpaid balance due on the deed of trust made to secure the note for $800, and ordered defendants to deliver its possession to plaintiff; that plaintiff is entitled to the two savings bonds, and is entitled to possession of the deed of trust executed in his favor by the purchasers of his home on 64th Street; and that defendants are entitled to the sum of $288.50 out of the sum of $1106.76 deposited in court, and plaintiff is entitled to the balance of $818.26.

Appellants contend that the transactions between the parties were valid. The evidence shows that respondent had lapses of memory which grew worse after the death of his wife; that at times he did not recognize his own personal effects, spoke of his wife as though she were living; and had delusions that Mrs. Dodson was his wife. Dr. Walla testified that when he first called upon plaintiff he found him feeble, unable to converse intelligently, and in confusion as to what happened to him days or weeks before. He also testified that altogether he had visited plaintiff about 6 times; that the last visit was on December 31, 1943, at which time plaintiff's condition was practically the same as it was the first time he saw him; that he considered plaintiff in a senile condition, and that a man does not improve when he is senile; that it had been his experience in such cases that the patient has lucid intervals and at other times he has delusions; and that the patient gets worse as he gets older.

Plaintiff's testimony showed that his memory was hazy, and that he was uncertain as to the time or the happening of events, and as to his own actions. He was not sure when his wife died, and he did not know how long he had lived with defendants. He testified that he did not remember leaving the Dodson home or of entering the sanitarium; that he did not remember being at the sanitarium, but he remembered something about being taken away from there but he did not remember where he was taken; that he remembered talking to Bummer about his bank account, but he did not remember transferring it; that he did not remember talking with defendants about the agreement dated February 2, 1944, or where he was when he signed it; that he did remember Bummer telling him he was going to have an attorney prepare a will for them, and did remember being in the attorney's office.

Defendant Victoria Bummer testified that when plaintiff first came to live with them he was completely worn out and grieved about his wife; and that she (the witness) was "actually scared of him, because he was really run down."

[1, 2] The evidence was sufficient to support the court's finding that plaintiff was suffering from senile dementia at the time he signed the agreement and will. As was stated in the case of Burgess v. Security-First Nat. Bank, 44 Cal.App.2d 808, at page 816, 113 P.2d 298, at page 303: "A judgment will not be reversed when there is substantial evidence supporting the findings or where different inferences might rationally be drawn therefrom. The same rules apply to the determination of mental capacity; and the findings of the trial can be overthrown only when they totally lack the support of substantial evidence."

As stated before, the court also found that defendants had induced plaintiff to enter into the agreement and to make the will, and to place his money in a joint account while plaintiff was incapable of understanding the legal effect of his actions. That this finding is supported by the evidence is sufficiently shown by the following testimony of defendant Raymond Bummer.

He testified that he first "ascertained he [plaintiff] had a bank account" when he (defendant) went to the sanitarium on December 31, 1943; that while he was at the sanitarium he asked plaintiff if it would be all right to transfer the bank account into a joint account; that he asked plaintiff if he felt like the defendant "could do some good and help him out so that I could take care of him and he would like to live with me the rest of his time," and that plaintiff agreed to live with him; that Dr. Walla went to the bank with him and plaintiff when the bank account was changed to a joint account; that Dr. Walla told defendant he thought it was all right to do it since defendant was "trying to be a gentleman"; that the defendant knew plaintiff was in a weakened condition and was forgetful at times; that he did not ask Dr. Walla whether plaintiff was mentally competent to transact business; and that "to tell the truth," there was no discussion with plaintiff about the will. He also testified that he believed he and plaintiff discussed the matter of a will once or twice before going to an attorney; that the defendant probably mentioned the will first—he asked plaintiff if it would be proper to make a will and plaintiff said he didn't see anything wrong with it, but he (defendant) "didn't try to push anything over on him, saying he had to do it"; that defendant told the attorney the will was to provide that defendants receive all of plaintiff's property upon his death; after the will had been prepared, the attorney read it to plaintiff, and then plaintiff had a chance to read it, and took it in his hands to examine it; that, thereafter, $200 was withdrawn from the joint bank account, $100 of which was used to pay the attorney for his services, and the balance went to plaintiff—defendant handed it to him. He testified further that plaintiff had the $100 whenever he wanted it, a few dollars at a time; that defendant put it in plaintiff's drawer where plaintiff could get it. He further testified that before the property on Springvale Drive was purchased, he told plaintiff he would like to buy it—that he thought it would make a nice place and plaintiff "would have a place always provided for him," and he told plaintiff if he did not want defendant to use the money defendant could borrow it; that he (defendant) had $50 of his own which he paid down on the property; that he went home and talked about it and plaintiff said it was all right for defendant to use his money, and defendant told plaintiff that he wouldn't lose a dime on it; that defendants and plaintiff went to the bank and withdrew $3200 from the joint account to pay the balance on the property; that to defendant's knowledge the plaintiff never had any independent advice in any of the transactions between plaintiff and defendant; the defendant probably should have gone some place for some independent advice for plaintiff, but the plaintiff told him it was not necessary and he took plaintiff's word for it; and he guessed the plaintiff had the utmost confidence in him at that time.

The attorney, who prepared the contract and will, testified that all of the parties read the instrument; that he and a law clerk from an adjoining office witnessed the will; that he first introduced the law clerk, and then asked plaintiff if that instrument was his last will, and plaintiff said it was; that he then asked plaintiff if he wished him and the law clerk to sign it as witnesses, and the plaintiff said he did.

The evidence shows that defendants' interest in plaintiff began when they learned he had a bank account; that previous to that time they had not seen him for about 9 months, although they had known him approximately 17 years, knew he was without close friends or relatives, and that he was deeply grieved over the loss of his wife. Furthermore, the invitation to live with them was extended apparently upon the condition that the bank account be made a joint one. Within a period of less than 2 months after plaintiff went to live with defendants, plaintiff's bank account was transferred to the joint account, the contract and will were made, and the house and lots were purchased and title taken in joint tenancy. When plaintiff left the Bummers, they had possession of his bank book, bonds, trust deed, and some personal effects and baggage. Defendants had knowledge of plaintiff's mental condition when they took him into their home, and it does not appear that plaintiff refused any of their requests, but that he trusted them and relied upon their advice.

[3, 4] Appellants contend that the contract is binding on plaintiff. In support of that contention they argue, in effect, that plaintiff was never adjudged incompetent, was not without understanding, transacted certain business for himself such as making deposits in the bank, and that the contract was fair and equitable. Plaintiff had not been adjudged incompetent and, it appears, he was not entirely without understanding. In such a case the test to be applied is whether the party was mentally competent to deal with the subject before him with a full understanding of his rights —whether he actually understood the nature, purpose and effect of what he did. Maxon v. Avery, 43 Cal.App.2d 155, 157, 110 P.2d 446; Carr v. Sacramento C. P. Co., 35 Cal.App. 439, 442, 170 P. 446. It was stated in Jacks v. Deering, 150 Cal. 272, 274, 88 P. 909, 910, regarding a mortgagor's mental soundness, that at the time she executed the promissory note and mortgage she was "then a person of unsound mind, but was not entirely without understanding, nor had her incapacity been determined; that at the time of her execution of the said promissory note and mortgage she did not have sufficient mental capacity to understand the nature, purpose and effect of the transaction in which she was engaged, or of the promissory note and mortgage * * *." The trial court herein found that plaintiff was not mentally capable of understanding the acts or the legal effect of the acts in which he was engaged, and that finding is supported by the evidence. Furthermore, it cannot be said that the contract was fair and equitable. Under its provisions, if the arrangement should become tiresome or no longer beneficial to defendants, they could terminate the agreement regardless of the plaintiff's then age, physical, or financial condition. If, on the other hand, plaintiff should become dissatisfied with the transaction, he would have no choice, but would be required to remain with defendants. He was burdened further with the insecurity of his position in not knowing how long defendants would choose to perform the agreement.

[5] The court's finding that defendants gave no consideration for the joint tenancy deed is supported by the evidence.

In view of the foregoing conclusions, it is unnecessary to determine whether the contract was void, for want of mutuality or for any other reason, or to discuss other contentions of appellants.

Appellants assert that plaintiff did not pay for his room and board for the year he was with them, and that, if it was proper for the plaintiff to prevail herein, the status quo of the parties should have been restored. The record discloses that, in determining the amount to be awarded defendants, the court considered, among other things, the rental value of the property on Springvale Drive, the number of months defendants had lived there free of charge, the amounts expended by defendants to improve that property, and the down payment of $50 made by defendants. The judgment provided that plaintiff should take the property subject to the $800 trust deed which had been placed thereon in order to pay for the improvements.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

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77 Cal.App.2d 461

TRUCK INS. EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15461.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1946.

Hearing Denied Feb. 27, 1947.

1. Workmen's compensation 🔑610

An injury "arises out of the employment" when there is apparent to a rational mind, upon consideration of all circumstances, a causal connection between conditions under which work is required to be performed and the resulting injury. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

2. Workmen's compensation 🔑612, 1733

In determining whether an injury through action of the elements arose out of employment so as to be compensable, fact-finding body is required to make a finding as to whether risk from which injury arose was one which was common to entire community or one which by reason of nature of employment was greater than risk to which public in general is exposed, and where hazard is uncommonly great, risk arises out of employment and injury is compensable. Labor Code, § 3600.

3. Workmen's compensation 🔑639

Harm resulting from lightning may be compensable as an injury arising out of and in the course of the employment, where injured employee is, by reason of his employment, peculiarly exposed to risk of injury from this source. Labor Code, § 3600.

4. Workmen's compensation 🔑1939

A fact finding by the Industrial Accident Commission, if it has substantial support in the evidence, is conclusive as a finding of fact and is binding upon court on a petition for writ of review. Labor Code, § 5953.

5. Evidence 🔑19

Court took judicial notice, as a matter of common knowledge, of matters relevant to conductors and insulators of electricity and matters relevant to the transmission of electricity over a gap.

6. Workmen's compensation 🔑1939

Where conclusion of Industrial Accident Commission is one as to which reasonable minds might differ, reviewing court must abide by such conclusion, even if court believes that a contrary conclusion would be equally reasonable. Labor Code, § 5953.

7. Evidence 🔑8

The tendency of lightning to be attracted to tall objects which are conductors of electricity and that such objects are more commonly struck by lightning than others not so situated, are matters of common knowledge.

8. Workmen's compensation 🔑639, 1417

Implied finding of Industrial Accident Commission that there was increased danger from lightning to an employee stationed upon the wet roof of a building during a storm was in accordance with common knowledge and required no supporting expert testimony, and death of such workman when he was struck by lightning was compensable as arising out of employment. Labor Code, § 3600.

◆

Original proceeding on the petition of Truck Insurance Exchange for a writ of review to annul an award by the Industrial Accident Commission of a workman's compensation death benefit and other sums in favor of Ethel Janeta Gilstrap and Nora

Mae Gilstrap, the surviving wife and mother of William Fleet Gilstrap, deceased employee.

Award affirmed.

Syril S. Tipton, of Los Angeles, for petitioner.

R. C. McKellips, of San Francisco, and John A. Rowe, Jr., of Los Angeles, for Industrial Accident Commission, respondent.

SHINN, Justice.

Petitioner herein, workmen's compensation insurance carrier for one Max W. Beebe, seeks in this proceeding annulment of an award of a death benefit and other sums to the surviving wife and the mother of William Fleet Gilstrap, who was killed by a bolt of lightning while employed by Beebe as a carpenter's helper.

The evidence as to the circumstances of the accident was meager, consisting of the testimony of Beebe, whose account of the accident was based upon hearsay. The parties to the proceeding evidently understood that the accident happened as related by Mr. Beebe; no evidence was offered to supplement or contradict it. Decedent was working as a carpenter's helper on the roof of a single-story frame and stucco building which Beebe was constructing, and had been engaged in carrying composition shingles to the roof where the carpenters were laying them. While he was on the roof of the building, in the vicinity of a cast iron vent pipe, he was struck by a bolt of lightning, which caused his death. There was no evidence of damage to the building. The accident happened about 10 a. m.; it had been raining that morning but the rain had subsided. None of the other workmen were on the roof or saw the lightning strike Gilstrap, but they were somewhat deafened by the shock and, upon inquiring whether anyone had been injured, noticed that Gilstrap was missing and they found his body lying upon sandy ground, where he had fallen from the roof. Burns upon his head were the only visible marks of injury, and the immediate cause of his death was found to be electrocution. The findings upon which the awards were based are challenged upon the ground that the injury which caused death was not one "arising out of" the employment. Labor Code, sec. 3600. The existence of other conditions upon which the right to compensation depended is conceded.

[1, 2] The legal principles involved are familiar. The requirement of our Labor Code that an injury, to be compensable, must arise out of the employment is found in the workmen's compensation laws of all the jurisdictions to which we shall refer. The courts have accepted in principle the succinct statement in Re Employers' Liability Assurance Corporation, 215 Mass. 497, 102 N.E. 697, L.R.A.1916A, 306, that, "It [the injury] arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." In determining whether an injury through action of the elements arose out of the employment, the commission or other fact-finding body is required to make a finding as to whether the risk from which the injury arose was one which was common to the entire community or one which by reason of the nature of the employment was greater than the risk to which the public in general was exposed. Where the hazard is uncommonly great, the risk arises out of the employment and the injury is compensable. The legal principles which determine liability are the same whether the injury results from an act of God or a human agency. In either case it is a question of fact whether there was a causal connection between the nature of the employment and the injury.

[3-5] The courts of all jurisdictions recognize the principle stated in 71 C.J. 758, that "Harm resulting from lightning may be compensable as an injury arising out of and in the course of the employment, where the injured employee is by reason of his employment peculiarly exposed to risk of injury from this source." The sole question before us is whether the implied finding of the commission that Mr. Gilstrap was peculiarly or uncommonly exposed to injury by lightning finds support in the evidence as to the circumstances of the injury and the reasonable inferences therefrom. If it has sub-

stantial support in the evidence it is conclusive as a finding of fact and is binding upon the court. Labor Code, sec. 5953. No expert testimony was introduced as to whether one in Gilstrap's position would be exposed to unusual danger from lightning. The decision of the commission was based upon an assumed knowledge of the laws of nature as applied to actions of lightning in the circumstances. We are of the opinion that the following material facts which it was necessary for the commission to take into consideration are of common knowledge: that with respect to wooden objects, a wet one is a better conductor of electricity than a dry one, and a person standing upon a wet surface is more susceptible to electric shock than one who stands upon a dry surface; that as between a short gap and a long one in its path, an electric force is more likely to jump the short one, and hence where atmospheric conditions are such that an electric force is about to be discharged toward the earth, an object which projects above the surrounding surface and is closest to the point of discharge and which is a ready conductor of electrical energy will be the one most likely to receive it; also, that cast iron is a conductor of electricity.

[6] If the conclusion of the commission is one as to which reasonable minds might differ, it would be our duty to abide by it, even if we believed that a contrary conclusion would be equally reasonable. A review of the authorities leaves no doubt that the question is one as to which reasonable minds have differed, and may continue to differ. Many courts have sustained awards of compensation for injuries or death occasioned by lightning, or have annulled awards denying compensation where the question was the same, namely, whether the nature of the employment was such as to subject the employee to an unusual risk of injury. In the cases to which we shall refer, the conclusions were based upon testimony, or upon supposed common knowledge, that lightning is less likely to strike the flat surface of the ground than it is to strike at high points or to strike objects such as buildings or trees which extend a substantial distance above the surrounding surface, if they are free conductors of electric energy. In at least an equal number of cases and under comparable circumstances compensation has been denied. While in both groups of cases the courts have usually followed the findings of the board or commission, in a number of them contrary conclusions have been reached, and have been based upon the ground that the findings of the commission or board were not in accord with the evidence or with facts which were of common knowledge.

The position of the injured person beneath a tree during a storm was held to entail unusual danger from lightning in the following cases: Chiulla De Luca v. Board of Park Com'rs, 94 Conn. 7, 107 A. 611; Lebourgeois v. Lyon Lumber Co., 1927, 6 La.App. 216; Fontenot v. Lyon Lumber Co., 1927, 6 La.App. 162; Gasca v. Texas Pipe Line Co., 1925, 2 La.App. 483; State ex rel. People's Coal & Ice Co. v. District Ct. of Ramsey County, 129 Minn. 502, 153 N.W. 119, L.R.A.1916A, 344; Madura v. City of New York (Bronx Parkway Commission), 238 N.Y. 214, 144 N.E. 505. The same conclusion was reached where the employee had taken refuge in a building, in Consolidated Pipe Line Co. v. Mahon, 152 Okl. 72, 3 P.2d 844; Nebraska Seed Co. v. Industrial Commission, 206 Wis. 199, 239 N.W. 432; Bauer's Case, 314 Mass. 4, 49 N.E.2d 118; and Buhrkuhl v. F. T. O'Dell Const. Co., 232 Mo.App. 967, 95 S.W.2d 843. In the following cases structures or other objects in close proximity to the injured person at the time he was struck were held to have accentuated the danger from lightning: Aetna Life Ins. Co. v. Industrial Commission of Colorado, 81 Colo. 233, 254 P. 995 (a wire fence); Moody v. Tillman, 45 Ga.App. 84, 163 S.E. 521 (a turpentine still); Mathis v. Ash Grove Lime & Portland Cement Co., 127 Kan. 93, 272 P. 183 (a railroad track); Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 193 N.W. 466; Van Kirk v. Hume-Sinclair Coal Mining Co., 226 Mo.App. 1137, 49 S.W.2d 631 (electrically operated steam shovel and transmission wire); United States Fidelity & Guaranty Co. v. Rochester, Tex.Civ.App., 281 S.W. 306 [affirmed 115 Tex. 404, 283 S.W. 135] (steel shovel and pipeline); Andrew v. Failsworth Industrial Soc.

[1904], 2 K.B. 32, 6 W.C.C. 11 (upon high scaffolding); Stout v. Elkhorn Coal Co., 289 Ky. 736, 160 S.W.2d 31 (while working in a coal mine near an earth crack which extended downward from an oak tree which was struck by lightning); Giovine v. United Hebrew Cemetery, et al., 263 App.Div. 772, 30 N.Y.S.2d 929 (while digging a grave); Industrial Commission of Ohio v. Laraway, 46 Ohio App. 168, 188 N.E. 297 (steel bristle broom); Hassell Iron Works Co. v. Industrial Commission 70 Colo. 386, 201 P. 894 (a steel bridge); and Emmick v. Hanrahan Brick & Ice Co., 206 App.Div. 580, 201 N.Y.S. 637 (wire cable).

The case of Andrew v. Failsworth Industrial Soc., supra [1904], 2 K.B. 32, 6 W.C.C. 11, is closely in point and has been cited extensively. The deceased was struck by lightning while laying brick upon a scaffolding at a height of about 23 feet from the ground. His position was held to have involved more than normal risk, because of the height of the scaffolding and, presumably, its wet condition. The finding that the injury arose out of the employment was sustained on appeal. If the facts of all the reported cases furnish a dependable criterion, it would appear that persons who are in the proximity of tall objects which are conductors of electricity are more likely to be struck, and more commonly are struck by lightning than others not so situated. The courts have frequently taken judicial note of the natural tendency of such objects to increase the risk. Chiulla de Luca v. Board of Park Com'rs., supra, 94 Conn. 7, 107 A. 611, 612; Bauer's Case, supra, 314 Mass. 4, 49 N.E.2d 118; Buhrkuhl v. F. T. O'Dell Const. Co., supra, 232 Mo. App. 967, 95 S.W.2d 843, 846; Consolidated Pipe Line Co. v. Mahon, supra, 152 Okl. 72, 3 P.2d 844; Emmick v. Hanrahan Brick & Ice Co., supra, 206 App.Div. 580, 201 N.Y.S. 637, 638. See also Horovitz, Workmen's Compensation, p. 106. It seems to us that in the cases which we have cited the courts reached a more satisfactory conclusion than those of the fact-finding bodies and courts which have taken the view that lightning is as likely to strike in one place as another.

[7, 8] In our case the commission was of the view that the controlling facts above mentioned are of common knowledge. Petitioner insists that we should hold that they are not of common knowledge and argues that if we should so hold, the finding of the commission would be without support in the evidence. But, as already indicated, our views as to the well known natural tendency of lightning to be attracted to the kinds of objects which are more frequently struck are the same as those of the commission. The implied finding that there is increased danger from lightning to one who is standing upon the wet roof of a building during a storm is in accordance with common knowledge and requires no supporting expert testimony. Since this conclusion of fact is controlling, it would serve no useful purpose to review the cases relied upon by petitioner, in which it was held that the risk of injury by lightning is common to all persons who venture out in a storm.

It was the duty of the commission to decide as a question of fact whether Mr. Gilstrap's exposed position on the roof involved an uncommon risk, that is to say, one that was substantially greater than the risks of all others who were in the same vicinity. The fact that other outdoor workmen might also have been struck by lightning would not necessarily require the conclusion that all persons in the neighborhood were equally exposed. Those who were required to carry on their work in exposed positions may all have been in greater danger than others in the vicinity who were sheltered from the storm.

We have not discussed cases which involved injuries through other acts of God, such as tornadoes, floods, heat, cold, etc., for the reason that injuries from lightning are generally distinguishable upon their facts. A person who is injured by a bolt of lightning which strikes at a single point is usually occupying a position among surroundings which differentiate it from the positions of others in the vicinity, and this is not generally true in cases of injuries from heat, cold, floods, cyclones, and the like, where all those who were exposed may have been equally subjected to danger.

The award is affirmed.

DESMOND, P. J., and WOOD, J., concur.

77 Cal.App.2d 571

PEOPLE v. PRATT.

Cr. 1978.

District Court of Appeal, Third District, California.

Jan. 8, 1947.

1. Criminal law 🔑1144(13)

On defendant's appeal from judgment of conviction, record was viewed in light most favorable to state.

2. Criminal law 🔑1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict the existence of every fact which jury deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

3. Criminal law 🔑1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

4. Homicide 🔑250

Evidence warranted conviction for manslaughter.

5. Criminal law 🔑1169(3)

In homicide prosecution, admission of testimony of witness that deceased stated that defendant had beaten deceased was not prejudicial, where defendant admitted that defendant had beaten deceased with her hands until defendant felt blood on her hands.

6. Criminal law 🔑1169(3)

Error in admission of evidence is harmless if fact is proved by defendant.

7. Criminal law 🔑1044, 1045, 1063(5)

Defendant waived any error relating to form of question put to defendant on cross-examination by making no determined effort to procure ruling on defendant's objection to form of question, and by not moving to strike answer, and by not making failure to give ruling, ground of new trial motion.

8. Criminal law 🔑706

District attorney introducing defendant's statement given on the day after arrest could not be required to introduce defendant's statement given on day of arrest.

9. Criminal law 🔑1171(1)

In homicide prosecution, district attorney's statement in closing argument that centuries ago families of deceased avenged killings, and that district attorney's duty was "to see you sleep safely at night and your skull is not crushed" was not prejudicial, where evidence clearly supported conviction.

10. Criminal law 🔑1171(1)

Generally, courts are strongly inclined against setting aside convictions on ground of misconduct of district attorneys alone

11. Criminal law 🔑730(7)

District attorney's statement in argument excusing absence of finger print evidence was not prejudicial as stating his opinion in form of fact, in view of instructions, and fact that district attorney was merely attempting to rebut inference which defendant's counsel may have drawn from absence of fingerprints.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Ella Pratt was convicted for manslaughter and her motion for a new trial was denied. From the judgment of conviction and the order denying a motion for new trial, she appeals.

Judgment and order affirmed.

Chester Monette, of Eureka, for appellant.

Robt. W. Kenny, Atty. Gen., by Jas. O. Reavis, Dep., of San Francisco, for respondent.

PEEK, Justice.

By an information filed by the District Attorney of Humboldt County defendant was charged with the crime of murder, to which she pleaded not guilty. At the conclusion of the trial the jury found her guilty of manslaughter. Her motion for a new trial was denied and she was sentenced to the state prison for women at Tehachepi. She thereafter appealed to this court from an order denying said motion and from the judgment, contending (1) that the evidence was insufficient to sustain the verdict and judgment, (2) that the court erred in matters of law, and (3) that the district attorney was guilty of prejudicial misconduct.

[1] The record, viewed in the light most favorable to the respondent (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778), discloses that defendant and deceased were respectively the past and present mistresses of one Edward Brown, the complaining witness; that on Monday, February 25, 1946, while defendant and her mother were returning from the Town of Trinidad in Humboldt county and at a place referred to generally throughout the transcript as the "Forks of the Road" they met deceased and another woman. According to the testimony of the defendant, the four women thereupon set out upon a round of drinking, consuming wine and beer to such an extent that two of the participants lost consciousness. From time to time during the afternoon they were joined by other friends, both men and women, who likewise partook of beer and wine. About six o'clock p.m. defendant and decedent, each taking a bottle of wine, proceeded to the home of defendant's father where more wine was consumed and defendant changed her clothes preparatory to going to the city of Eureka. On their way back to the "Forks of the Road" deceased became increasingly intoxicated. She sat down and promptly went to sleep. When she awoke a discussion arose concerning a child born to defendant while living with Brown, which child subsequently died while defendant was confined in a hospital and the child was in the custody of Brown, who was then living with the deceased. When defendant demanded the details of the child's death deceased became reticent and in effect accused defendant of bringing her there to kill her. Upon deceased's refusal to answer, defendant struck her repeatedly in the face with her fists and choked her. Deceased, whom defendant stated was more intoxicated than she, was the elder and smaller of the two, and made no attempt to fight back or resist, but begged defendant to stop beating her. Defendant felt blood on her hands and, thinking deceased had "had enough", left deceased (who was then conscious) lying on the ground and returned to her friends at the "Forks of the Road". She left behind the bottle of wine from which they had been drinking and took with her, in her purse, the other bottle. To her friends she related what had happened and how she had given deceased a sound beating. While more wine was being consumed, two of the members of the group left saying they were going to see where deceased was. They returned shortly—but in defendant's belief too soon to have walked to the scene of the beating and back—and declared that deceased was all right. About nine o'clock p. m. defendant left the others and flagged an automobile ride to Eureka where she arrived an hour later, after having partaken of additional liquor furnished by the driver of the car. In Eureka she joined a friend at a cafe and drank with her until midnight. The remainder of the night was spent in a cabin with a former brother-in-law. At approximately three o'clock the following afternoon (Tuesday), after having visited various bars during the intervening period, she was met by the prosecuting witness, Brown, who inquired as to the whereabouts of decedent. She told him about her "misunderstanding" with the deceased concerning the baby, and said he could find deceased where she had left her.

On cross-examination defendant testified that she did not strike deceased with the bottle at any time, although she did not appear to be positive about it and admitted that she might have told police officers that she had done so.

The prosecuting witness Brown testified that the last time he saw deceased was the evening of Sunday, February 24th, at the home of a friend where she was staying. He testified further that on the afternoon of February 26th he found defendant at a drinking place in Eureka, and when he asked her what she did with deceased she replied, "I got into an argument with her and beat her up", and that he would be able to "* * * find her right where I left her." The witness testified further that he then went to the sheriff's office and later accompanied the officers who went to the scene of the tragedy. On cross-examination he admitted that he was living with the deceased as man and wife although he knew she was married, and also that he had been convicted and had served a penitentiary sentence for assault with a deadly weapon.

The decedent when found was lying on her back, her hands folded across her breast. Her slacks were off and lying over her legs. Her face was swollen and bruised, and, according to the coroner and an autopsy surgeon, death was caused by a blow or blows on the head, although these witnesses were not in entire agreement as to whether it was a blunt or sharp instrument that inflicted the fatal wounds. However, both of them testified to the lacerated and bruised condition of the body, and the swollen appearance of the victim's face.

One Zuver, a truck driver employed by the State Highway Department, testified that on February 26th, at approximately 8:30 o'clock a.m., he first noticed deceased lying on her back at the side of the road at a place which corresponded with the one where the evidence showed the beating had occurred; that he passed the spot at thirty or forty minute intervals throughout the day; that he observed her time and again, and last saw her at approximately 3:30 o'clock in the afternoon; that it was raining all the time but he could see her face well enough to identify her; that her face and particularly her cheek seemed swollen, and that on his last trip he noticed that she had moved from her original position a distance of approximately three feet.

J. A. Morasco, a witness for respondent, stated that while returning to his home Monday evening February 25th, he noticed deceased and defendant sitting near the side of the road, and that at approximately five o'clock the following morning, while walking along the road on his way to work, he heard a groan coming from the spot where he had seen the two women the day before, and turning on his flashlight he saw deceased lying on the ground, obviously badly hurt. His further testimony was: "I stopped and asked: 'who beat the hell out of you?' * * * And so * * * She says 'Ella'. So I walked on about my business, and I got to the turn of the road. After I got to the turn of the road I heard a voice, says, 'Help please'. So I still kept going, got in the car, and went to my job. The following evening, on my way back, I met the Sheriff there and found out the lady was dead."

Leo Sullivan, county detective, testified that he found a broken wine bottle at the scene which appeared to have blood on it in addition to mud; that on lifting one of the many rocks lying about the place he noticed what appeared to be blood on the lower surface; and that no chemical test was made to establish the fact that the substance on the bottle and rock was blood, nor was any attempt made to get fingerprints.

Sheriff Ross testified, among other things, to the blood-soaked appearance of the ground where the body was lying, stating that the rocks buried in the mud at that place appeared to be stained with blood. He explained that the reason he did not make tests or take fingerprints was that he presumed from the fact that defendant had admitted that she had blood on her hands and that she had been drinking from the bottle she left there that it would be her fingerprints, if any, that would be found on the neck of the shattered bottle and that the foreign substance thereon would be the blood of deceased.

Other witnesses testified to seeing the deceased at the side of the road both before and after the beating. One of them stated that as she and her husband drove by in their car, it seemed as though the larger woman who was in a sitting position was trying to hide from view the face of the woman lying close to her, covering it quickly with her hands as the car went by.

[2, 3] Even though we were to give serious consideration to the summary of the evidence by appellant, which she contends is not sufficient to sustain the verdict, nevertheless "'* * * *We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the de-*

fendant will not warrant interference with the determination of the jury." [Italics added.] People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 780.

[4] Applying this well established rule to the record in the present case we find evidence showing two women fully aware of their relationship with the prosecuting witness Brown—the defendant being the one supplanted in his present affections by the deceased; the death of defendant's child while in his custody and while he and deceased were living together; the admission by defendant that she administered a severe beating to deceased who was older and smaller than herself and in addition so intoxicated she made no defense; the further admission of defendant that as a result of the beating she administered she had blood on her hands; the admitted possession of a bottle of wine at the place where the beating occurred and the subsequent finding there of a shattered wine bottle which had on it a substance resembling blood; the fact that a rock was found at the scene which likewise had the same substance upon it; the statement made by defendant to Brown the following day "You will find her where I left her";—these and other circumstances which the evidence discloses are such that we cannot say as a matter of law that the jury was not warranted in finding as it did or that the trial court was in error in refusing to grant a new trial. See People v. Neary, 104 Cal. 373, 380, 381, 37 P. 943.

[5, 6] The second assertion of error relates to the admission in evidence of the declaration of deceased accusing defendant of having beaten her, as testified to by the witness Morasco, who stopped when he heard the groans of deceased, but who continued on when she asked for help. It appears that the trial court first overruled defendant's objection to this testimony, but subsequently, and at the request of the district attorney, admonished the jury to disregard it. Even assuming that the declaration of the deceased was not admissible as a dying declaration, the reception thereof in evidence could not be deemed prejudicial in view of the fact that the defendant herself admitted that she had beaten deceased with her hands until she felt blood upon them. The rule is well established that "Error in the admission of evidence is harmless if * * * the fact is proved by the defendant himself." (8 Cal.Jur., pp. 615, 616, § 599.) Since the only statement attributed to the deceased and testified to by said witness which properly could be characterized as hearsay was the declaration that it was "Ella" who "beat the hell out of" her, it is apparent that under the rule above quoted defendant has not suffered any injury by reason of the admission in evidence of said testimony. The case of People v. Salaz, 66 Cal.App. 173, 183–185, 225 P. 777, which defendant cites in support of her argument on this point, involves an entirely different factual situation as well as an entirely different principle of law. There the testimony admitted over objection was the opinion of an autopsy surgeon as to a fact which under no conceivable theory was a matter for expert opinion. It was not a fact which defendant had himself admitted by his own testimony, nor had it been otherwise proven. Moreover, in the Salaz case the proof on the part of the prosecution tended to show that the act of appellant was justifiable, and the question of the sufficiency of the evidence was a very close one. Under such circumstances, the error could properly be deemed harmful. As has been shown, such is not the situation in the present case.

[7] Defendant also assigns as error the conduct of the district attorney during his cross-examination of the defendant in using the word "unmercifully" to describe the manner in which the deceased was beaten by her. Without implying that there was any impropriety in this respect, we need only point out that, while the court did not rule upon the objection interposed by defense counsel to the form of the question, nevertheless in view of the fact that no determined effort was made to procure a ruling on the objection and no motion was made to strike the testimony given in response to the question, and in view of the further fact that as far as the record discloses the failure of the court to make a ruling was not made a ground for the motion for a new trial, the defendant must be deemed to have waived any error in this

regard. 8 Cal.Jur. pp. 501, 502, § 516; People v. Westlake, 62 Cal. 303, 308, 309.

[8] It is the further contention of appellant that the district attorney improperly withheld evidence when he failed to introduce into evidence a statement given by defendant on the day she was arrested. Apparently the statement which was introduced was one taken a day later. In response to a motion made by counsel for defendant calling upon the district attorney to produce the prior statement, the trial court observed that it had "no control over the manner in which the prosecution presents its case * * * he may never introduce it in evidence, for all the court knows." Likewise we know of no rule which requires a prosecuting attorney to introduce such evidence if he does not see fit to do so. (See, 8 Cal.Jur., p. 105, § 198.)

Finally, defendant assigns as reversible error two statements made by the prosecuting attorney in his closing argument to the jury. The first, which counsel charges was an "appeal to the passion of the jury, which no doubt defendant would not have been convicted if omitted", relates to the use of certain language including the following: "Some centuries ago, if I were killed, my brothers, my uncles, various kinfolk, would swear a blood purge to go out and get the man that killed me, and there was a lot of killings, inter-family killings, and tribal * * * and his (the district attorney's) duty is to see you sleep safely at night, and your skull is not crushed."

In support of this contention defendant cites People v. Newman, 113 Cal.App. 679, 298 P. 1044. But that was a case where the misconduct of the prosecuting attorney was extensive and persistent, appearing on at least twenty different occasions and directed unremittingly at racial and religious prejudices, and in addition culminated in a gratuitous and unwarranted attack on the efficiency and integrity of courts of justice. Rather, the situation in the present case resembles that in People v. Frost, 37 Cal.App. 120, 123, 174 P. 106, where an Indian woman was being prosecuted for homicide and the appellate court held that the somewhat intemperate language of the district attorney in his argument to the jury, in which he declared that if she were acquitted she would go back and kill another man, did not in itself amount to prejudicial misconduct.

[9, 10] The general rule that "Courts are strongly inclined against setting aside convictions upon the ground of misconduct of district attorneys alone" (8 Cal.Jur., pp. 620, 621, § 602), merits application in the present case. We are unable to attribute to such remarks the effect which defendant gives to them. How the verdict of the jury or the action of the trial court in denying the motion for a new trial could have been or was controlled or affected thereby is not pointed out, and it is hardly conceivable that the language in question could have swayed the minds of jury or judge. Furthermore, the evidence clearly supports a conviction, and from an examination of the entire record it does not appear that the conduct complained of resulted in a miscarriage of justice. (See, 4 Cal.Jur.Supp., pp. 1007, 1008, § 602, and cases cited.)

The other particular in which defendant charges the prosecuting attorney with prejudicial misconduct is in that portion of his argument to the jury wherein he sought to excuse the failure of the prosecution to secure and place before the jury fingerprints evidence, stating in the form of a fact that which was obviously merely his opinion regarding the impossibility of procuring a good fingerprint from objects with smooth surfaces which have been outdoors for a long time and exposed to a drenching rain.

[11] In view of the careful instructions which the trial court gave the jury covering just such a statement as the one attacked, it is not reasonable to suppose that the jury could have been misled or otherwise influenced by said statement. Thus, one of the instructions declared: "The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, as to what facts have been proved; and, if there is a variance between the two, you must, in arriving at your verdict, to the extent that there may be such variance, consider only

the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments are not evidence in the case."

The prosecuting attorney, in addition to making the statement in question, did not purport to state any incriminating fact, but merely to rebut the inference which defendant's counsel may have drawn from the fact that fingerprints were not introduced in evidence. See People v. McRoberts, 1 Cal.App. 25, 27, 28, 81 P. 734.

The judgment and the order denying a motion for new trial are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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77 Cal.App.2d 580

RHOADS et al. v. NEWBY et al.

Civ. 3450.

District Court of Appeal, Fourth District, California.

Jan. 8, 1947.

Rehearing Denied Jan. 30, 1947.

1. Trial 🔑391

A finding of fact must be made by trial court as to material issue, if there is evidence relative thereto.

2. Appeal and error 🔑1071(6)

A judgment will not be reversed for want of a finding on an issue when record fails to reveal any evidence tending to establish such affirmative defense.

3. Appeal and error 🔑907(3)

When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of judgment and all proceedings necessary to its validity will be presumed to have been regularly taken.

4. Appeal and error 🔑907(3)

Defendants could not complain or appeal from adverse judgment that no findings were made on issue raised by cross-complaint, where appeal was based upon clerk's transcript alone, since in absence of proper record of testimony, appellate court must assume that failure of trial court to make such findings was due to the fact that no evidence was produced which would justify such findings.

5. Appeal and error 🔑907(2)

Where judgment was rendered for plaintiffs but did not mention cross-complaint and defendants appealed only from judgment in so far as it omitted adjudicating issues of their cross-complaint, appellate court must presume that issues raised by cross-complaint, in so far as they were also raised by answer were decided adversely to defendants in absence of proper record of testimony.

6. Appeal and error 🔑907(3)

Where trial court rendered judgment for plaintiffs, but did not mention cross-complaint, appellate court could presume in support of judgment on defendants' appeal based merely on the judgment roll and attacking only judgment in so far as it omitted adjudicating issues of their cross-complaint, that cross-complaint was dismissed either by defendants or by court, prior to judgment.

7. Vendor and purchaser 🔑352, 353

The fact that trial court rendered a judgment for plaintiffs for damages for breach of contract of sale of property precluded a finding and judgment that defendants were entitled to a rescission of entire contract for mutual mistake.

8. Appeal and error 🔑181

A judgment would not be reversed on grounds raised for the first time on appeal which, if urged before trial court, might have resulted in admission of evidence and the making of findings which would have obviated a reversal.

9. Appeal and error 🔑181

A party may not withhold an objection before trial court founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Action by Claude O. Rhoads and others against Fred A. Newby and others, for alleged breach of an agreement of sale of property, wherein defendants filed a cross-complaint. Judgment was rendered for plaintiffs, and defendants appeal from part of judgment in so far as it omits adjudicating issues of their cross-complaint.

Affirmed.

Hales & Hales and Edwin R. Hales, all of Relands, and Ray Howard, of Los Angeles, for appellants.

David H. Baldwin, of San Bernardino, for respondents.

GRIFFIN, Justice.

Plaintiffs filed their complaint in this action alleging breach of an agreement of sale of real and personal property. The breach here involved refers to the sale of about 1500 smudge pots which it was agreed were located on the real property. The sale of the smudge pots was evidenced by a bill of sale.

It is alleged that only 594 usable smudge pots were found on the property and that $274 worth of fertilizer ordered by the seller was to be paid for by the purchaser and to be offset against the total obligation owed by such purchaser. Damages in the sum of $5,000 were asked.

The answer filed admitted that a smaller number than 1500 smudge pots were found on the premises but claimed that there was a separate later independent agreement that if it should appear that more pots were required for proper protection of the premises, defendants would supply them. The three affirmative defenses alleged in the answer were practically the same allegations set forth in defendants' cross-complaint, which we will later discuss.

On these issues the case was set down for trial. At that time permission was granted to defendants to file a cross-complaint. The cross-complaint alleged that defendants and cross-complainants entered into the agreement to sell plaintiffs lot 61 and 1500 smudge pots located thereon; that the deed and bill of sale were delivered and that in the same escrow defendants were acquiring the real and personal property described from one Jonas for the same price; that cross-complainants never counted the pots but believed that there were 1500; that plaintiffs had an opportunity to count them; that if there was a lesser number than that set forth in the bill of sale it was a mutual mistake of the parties; that prior to the closing of the escrow defendants received a bill of sale of the pots located on the premises from Jonas and that bill of sale designated that number as 600; that defendants understood there were 1500 pots on the premises; that plaintiffs and also defendants discovered the error and later defendants offered to do "what was right" and provide as many as were necessary to care for the grove; that plaintiffs agreed that it would be satisfactory to close the escrow on that basis; that plaintiffs have violated their agreement to waive the shortage by commencing this action and asking $5,000 in damages; that defendants believed plaintiffs would compromise their agreement on reasonable terms based on their requirements of smudge pots during the cold season "just now closing". Cross-defendants then prayed for rescission of the entire agreement and deed to the real property and that the court determine the terms and amount defendants should restore to plaintiffs by reason of the rescission.

Cross-defendants answered, admitted due execution of the agreement to sell the real and personal property and the bill of sale of 1500 smudge pots, but denied any knowledge of the Jonas transaction. They denied any subsequent arrangements with defendants about a reduction in the number of smudge pots and the time when they were to be supplied. They admitted receiving a written notice of rescission. They prayed that the cross-complainants take nothing by their cross-complaint and that "the same be dismissed".

The judgment recites that the court heard the testimony and examined the proofs offered by the respective parties and that they waived findings of fact. The judgment ordered that plaintiffs have judgment against defendants in the sum of $1,130, being for 906 smudge pots, and that defendants be credited on said judgment in the sum of $274 for fertilizer furnished to plaintiffs.

No mention is made of the cross-complaint in the judgment. Defendants and cross-complainants appeal from "a part of the judgment * * * insofar as it involves any issue involved in their cross-complaint (if said judgment does involve the same, which they do not admit) and insofar as it omits adjudicating the issues of their cross-complaint. No appeal is taken from that part of the judgment awarding damages to plaintiffs insofar as it involves plaintiffs' claim sued upon in the complaint." The appeal comes to this court based upon the clerk's transcript alone.

It is now argued by defendants that it was reversible error for the trial court to fail to adjudicate the issue presented by the cross-complaint; that the judgment should be reversed and remanded to the trial court because the issues presented by the pleadings have not been disposed of, citing Dieterle v. Bekin, 143 Cal. 683, 77 P. 664, 666. That was a case in which findings were not waived and the trial court omitted to find upon a "material issue" and there was "Evidence relative thereto". It was held that a judgment for defendant must be reversed, with directions to make a finding upon that issue; that "The trial of a cause is not completed until the court has made its finding upon all the material issues"; and that "If there is no evidence upon an issue, the finding must be against the party on whom was the burden of proof", citing Leviston v. Ryan, 75 Cal. 293, 17 P. 239.

[1-3] Factually, the two cases are dissimilar. In the instant case the judgment does not recite that evidence was taken on the issues attempted to be presented by the cross-complaint. Furthermore, findings on all issues, whether established or not, were specifically waived by the parties. No objections were made in the trial court to the judgment as entered and no motion for new trial or to correct or modify the judgment as signed and entered was made. The requirement is that a finding be made as to material issue, and applies "[when] there was evidence relative thereto". This court will not reverse a judgment for want of a finding on an issue when the record fails to reveal any evidence tending to establish such affirmative defense. Wise v. Burton, 73 Cal. 174, 175, 14 P. 683; Hubbard v. San Diego Electric Ry. Co., 201 Cal. 53, 56, 255 P. 508. When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. Bowers v. Union Trust Co. of San Diego, 117 Cal.App. 259, 3 P.2d 614.

[4] We therefore are required to assume, in the absence of a reporter's transcript or other proper record of the testimony, that failure of the trial court to find facts favorable to defendants' contention was due to the fact that no evidence was produced which would justify such finding. Ouzoonian v. Vaughan, 194 Cal. 139, 145, 228 P. 8; Bowers v. Union Trust Co., supra, 117 Cal.App. page 264, 3 P.2d 614.

In Calkins v. Berliner, 26 Cal.App. 601, 603, 147 P. 985, defendant filed a counterclaim and the court omitted finding upon and also ignored in the judgment the issue thus presented by the counterclaim. The court said, at page 603 of 26 Cal.App., at page 986 of 147 P.: "As the evidence is not presented on this appeal, we should assume, in favor of the judgment, that the defendants offered no evidence concerning this counterclaim, and the omission of the court to find upon the issue thus raised by defendants' pleading is not a sufficient ground for reversal of the judgment." Citing Roberts v. Hall, 147 Cal. 434, 82 P. 66.

[5-8] From the pleadings, it affirmatively appears that nearly all of the allegations of defendants' cross-complaint are set up in their answer as affirmative defenses to plaintiffs' cause of action. We must presume, on this appeal, that all those issues were decided adversely to defendants. We might even presume, in support of the judgment, that the cross-complaint was dismissed either by the defendants or by the court, prior to judgment. The fact that the trial court rendered a judgment for damages to plaintiffs for defendants' breach of the contract would preclude a finding and judgment that the cross-complainants were entitled to a rescission of the entire contract. Any error of the trial court in failing to render judgment on the cross-complaint would not be prejudicial to cross-complainants since a reversal of the judg-

ment for the purpose of a retrial on those issues would, no doubt, result in a judgment adverse to them. It would not be proper for us to reverse this judgment on grounds raised for the first time on appeal which, if urged before the trial court, might have resulted in the admission of evidence and the making of findings which would have obviated a reversal. S. H. West & Co. v. Harry F. Wagner, 117 Cal.App. 523, 525, 4 P.2d 276.

[9] A statement in Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 P. 195, 196, seems to be apropos to the facts here presented. It is there states: "It is unfair for a party to withhold an objection founded upon a defect which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated."

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

77 Cal.App.2d 500

In re NAVARRO.

Cr. 1975.

District Court of Appeal, Third District, California.

Dec. 31, 1946.

Hearing Denied Jan. 27, 1947.

1. Bastards 🔑13

The word "adopts" as used in statute providing that father of illegitimate child, by publicly acknowledging it as his own, thereby "adopts" it as such, is used in sense of "legitimates" since adoption, properly considered, refers to persons who are strangers in blood. Civ.Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Adopt".

2. Bastards 🔑13, 100

The legitimation of an illegitimate child by the father's public acknowledgment of the child as his within meaning of statute, changes child's status from that of an illegitimate child to that of a legitimate one, but does not make the child the child of the father's wife who is not the natural mother, and does not give child rights of inheritance from its father's wife, though she consents to the legitimation. Civ.Code, § 230.

3. Bastards 🔑13, 15

Legitimation of an illegitimate child under statute by father's public acknowledgment of the child as his own makes the child the legitimate child of both natural parents, and therefore does not give the father a superior right to child's custody, services or earnings over the right of the natural mother. Civ.Code, § 230.

4. Habeas corpus 🔑113(12)

Trial court's determination that welfare of illegitimate child legitimatized by father under statute by publicly acknowledging that it was his own, would be best served by giving child's custody to the natural mother, if supported by evidence, was conclusive in absence of abuse of discretion. Civ.Code, §§ 138, 197, 200, 230.

5. Bastards 🔑15

Evidence sustained trial court's determination that illegitimate child's natural mother was entitled to child's custody rather than child's father who had allegedly legitimized the child under statute by publicly acknowledging it as his own. Civ.Code, §§ 138, 197, 200, 230.

PEEK, J., dissenting.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Proceeding in the matter of Josephina Navarro, a minor. Luis Navarro instituted proceedings for habeas corpus against Gladys Hull to secure the custody of Josephina Navarro. From an order discharging the writ of habeas corpus, Luis Navarro appeals.

Order affirmed.

Fontaine Johnson and Thomas C. Perkins, both of Sacramento, for appellant.

Hardin Barry, of Susanville, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order of the Superior Court of Lassen County discharging a writ of habeas corpus, in a proceeding initiated by Luis Navarro, who sought thereby to secure the custody of a female child of the age of about seven years, which child had been born to petitioner and one Gladys Hull (both Klamath Indians), who were never married. The petition alleged that in June, 1945, petitioner had publicly acknowledged said child to be his own, and had, with the consent of his wife, Joan Navarro, received said child into his family, and had otherwise treated said child as his legitimate child; that he had by his actions adopted said child and was entitled to her full custody and control; that Gladys Hull had, on November 14, 1945, against his wishes removed the child to Lassen County and refused to surrender her to petitioner. He further alleged that Gladys Hull was not a fit and proper person to have custody of said child, but that petitioner was a fit and proper person.

In response to the writ Gladys Hull produced the child. She also filed a return in which she alleged that Navarro had never contributed anything toward the support of the child, that she, herself, had provided her with religious and educational training; that in June, 1945, she brought the child to Sacramento together with her two other children and permitted them to visit petitioner who was then living with one Juanita Clark whom he subsequently married about November 14, 1945; that early in November, 1945, she took said children to Lassen County where she was then, and still is, employed. Petitioner, in an answer to said return, alleged that respondent was living in an illicit relationship with one Paul Sandover, and again alleged that she was not a fit and proper person to have the child's custody.

After a hearing the trial court filed a written opinion in which it was recited that Gladys Hull had taken the children to the home of petitioner in Sacramento and left them there with him and Joan Navarro for several months; that under the circumstances it appeared "and the Court so finds, that petitioner openly acknowledged the said child as his, and he thereby adopted her as his child." It was further stated, however, that the court was not satisfied that petitioner was entitled to the exclusive custody of the child for the reason that the best interest of the minor was the compelling consideration in the matter; that from the moral aspects of the situation, as disclosed by the evidence, there was little choice as between father and mother, but that conditions in Lassen County, where the mother was then living and employed, did not disclose anything which would interfere with the welfare and best interests of the child; that under the circumstances shown by the evidence the court was satisfied that the custody remain with the mother, with the right of the father to visit his daughter at reasonable times, and possibly to have her with him occasionally at such times as would not interfere with her welfare.

On this appeal the cause is submitted on an engrossed settled statement from which it appears that respondent testified that she had had the exclusive care of the child, had put her in a Catholic school since 1942, and had purchased $1,400 worth of government bonds for her; that since the child was nine months old Navarro had never contributed anything to her support nor communicated with her until the child was brought to Sacramento in June, 1945, when she was left with him temporarily; and that petitioner voluntarily turned the child over to her in November, 1945. Navarro testified that he had lived with his present wife in Sacramento since February, 1944, and that they were married in November, 1945; that he had informed his said wife and others that the child was his and had treated her as his own legitimate daughter.

Assuming that the evidence in the case is sufficient to support the conclusion that petitioner legitimated his daughter, as seems to be conceded by both parties, the contention of appellant that he therefore became entitled to her exclusive custody remains for decision.

Civil Code, section 230, provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

The precise question raised here as to the rights of the natural mother of a child born out of wedlock, who has not intermarried with the father of the child, after the father of said child has "adopted" it as his legitimate child by compliance with the provisions of section 230, supra, apparently has not heretofore been before the appellate courts of this state. In numerous cases the rights of children under such circumstances to inherit from the father have been presented for determination. See In re Estate of Lund, 26 Cal.2d 472, 159 P.2d 643, 162 A.L.R. 606, and In re Estate of Flood, 217 Cal. 763, 767, 21 P.2d 579. And the rights of such a child to a pension upon the death of its father were presented for determination in Jenkins v. City of Los Angeles, 60 Cal.App.2d 50, 140 P.2d 45. But in none of such cases have the rights of the natural mother been in issue.

Section 200 of the Civil Code provides that the mother of an *illegitimate* unmarried minor is entitled to its custody, services, and earnings; and section 197 of said code provides that the father and mother of a *legitimate* unmarried minor child are equally entitled to its custody, services and earnings. But under the theory advanced by appellant in this case, when an illegitimate child has been legitimated by its father, neither section 200 nor 197 thereafter applies, and the father alone is entitled to the custody of such child, and the rights of the mother granted by section 200, supra, are, even without her consent, destroyed by the acknowledgment of parentage by the father in conformity with section 230, though it must be conceded that because of section 224 of the Civil Code a judicial adoption could not be effected without the consent of the mother of an illegitimate child unless she came within the exceptions there stated—which are not applicable here.

[1] We think that appellant's position is untenable. Section 230, supra, is not, strictly speaking, an "adoption" statute, but a "legitimation" one. In Blythe v. Ayres, 96 Cal. 532, 559, 560, 31 P. 915, 916, 19 L.R.A. 40, the court said that "The verb 'adopts,' as used in section 230, is used in the sense of 'legitimates,' and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. See law dictionaries,—Bouvier['s], Black['s], Anderson['s] and Rapalje['s]. This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint. * * * Bar, in his work on International Law (p. 434), says: 'Legitimation of bastards, either by subsequent marriage or by an act of the government, (rescriptum principiis), is nothing but a legal equalization of certain children illegitimately begotten with legitimate children.' In other words, the object and effect of section 230 is to change the *status* and capacity of an illegitimate child to the *status* and capacity of a child born in lawful wedlock."

That case is frequently cited and quoted on this subject. In re Estate of Lund, supra, where the rights of a child born out of wedlock to inherit from his father who had legitimated him were in issue, the court quoted from Blythe v. Ayres that portion of the opinion above quoted, to the effect that the verb "adopts" as used in section 230, is used in the sense of "legitimates," and that adoption, properly considered, refers to persons who are strangers in blood, and legitimation to persons where the blood relation exists. Also see In re Estate of McNamara, 181 Cal. 82, 86, 183 P. 552, 7 A.L.R. 313, and In re Estate of Flood, supra, 217 Cal. at page 767, 21 P.2d 579, where the word "legitimation" rather than "adoption" under section 230 is emphasized. In fact, we find authorities generally using the word "legitimation" under such statutes. See In re Presley's Estate, 113 Okl. 160, 240 P. 89, 90; 10 C.J.S. Bastards, §§ 7–15, pp. 51–76; 7 C.J. 947, et seq.; 7 Am.Jur. 660, et seq.; 13 Cal.Jur. 933, et seq.

[2] While the effect of "legitimation" of a child is to change its status from that of an illegitimate child to that of a legitimate one, it does not follow that when such change of status is effected the child ceases to be the child of its natural mother. If it does not become as to her a legitimate child, in which event section 197 of the Civil Code comes into play, it must still be as to her an illegitimate child, as to whom the provisions of section 200 are applicable. Section 230 provides that where legitimated by the acts of the father the child is deemed for all purposes to be legitimate *from the time of its birth*. Certainly the statute does not mean that the child becomes the child of the wife of its father when the father has married one other than its mother. Such wife might, conceivably, have herself been unborn at the time of the birth of the child. Nor does such wife, by consenting to the legitimation of a bastard child of her husband, consent that it become her child or adopt it as such, nor does such child legitimated by its father acquire rights of inheritance from its father's wife. See In re Estate of Flood, supra, 217 Cal. at pages 777, 779, 21 P.2d 579; Keith v. Ault, 144 Ind. 626, 43 N.E. 924. Furthermore, since it has been held that an unmarried father of an illegitimate child may legitimate it (see Serway v. Galentine, 75 Cal.App.2d 86, 90, 170 P.2d 32, and cases there cited), if the natural mother of the child is not to be considered its legitimate mother, then a child legitimated by its unmarried father would become, in effect, a half orphan, deprived of the rights of support by, and inheritance from its natural mother.

[3] We think that no such results were intended, and that, upon the legitimation of the child by the father under the provisions of section 230, its status becomes that of the legitimate child of both of its natural parents, and that the rights of the child and of the parents thenceforth are the same as they would be had the child been born of the marriage of its natural parents. To this extent, then, the rights of the natural mother as set forth in section 200 of the Civil Code are modified for the benefit of the child, and neither of such parents has a superior right to its custody, services or earnings. This was obviously the position taken by the trial court, which considered the interests and welfare of the child as paramount to the equal rights of the parents, and, determining that such interests would be best served by leaving her with her mother, refused to disturb her present custody.

Appellant admits that there are no California decisions supporting his contention that he is entitled to the exclusive custody of the infant. He cites Allison v. Bryan, 21 Okl. 557, 97 P. 282, 18 L.R.A.,N.S., 931, 17 Ann.Cas. 468, as a similar case, in which, under somewhat similar circumstances, it was held that the father of the legitimated child was entitled to its custody. However, the statutes of that state were not then the same as those of California. Section 36, art. 2, ch. 59, Wilson's Rev. & Ann.St.1903, 10 O.S.1941 § 55, was the same as our section 230, supra; section 5 of said statute, 10 O.S.1941 § 5, provided, as did section 197 of our Civil Code prior to its amendment in 1913 (Stats.1913, p. 52), that "The father of a legitimate unmarried minor child is entitled to its custody, services and earnings." It is apparent therefrom that we have a distinction in statutory provisions that makes the Allison v. Bryan case inapplicable here. Furthermore, in the more recent case of Ex parte Hendrix, 186 Okl. 712, 100 P.2d 444, the Oklahoma court has limited the scope of its earlier decision in the Allison case. In Ex parte Hendrix, the mother of a child born out of wedlock sought to secure its custody as against the father. The trial court found that the respondent had publicly acknowledged the child as his own, having taken it into his home with the consent of his wife. It also found that neither of the parents was unfit to have the custody, and that while the mother had been guilty of serious breaches of the moral Code, respondent had likewise been guilty of such breaches, and in view of the fact that petitioner was the mother of the child it would probably be given more loving care and attention in her home than in that of respondent, and it was to the best interests of the child that the custody be given to the mother. Respondent there urged that under section 5, supra, he was entitled to the custody, but the Supreme Court said that under the findings the trial court rightly considered the welfare of the child as of paramount importance.

In Allison v. Bryan, 26 Okl. 520, 109 P. 934, 138 Am.St.Rep. 988, 30 L.R.A.,N.S., 146, also cited by appellant, the same parties as in the earlier case were involved. The father, who had been given the custody by the judgment in the earlier case, had denied the mother access to her child, and action was brought by the mother to require respondent to allow her such access. Respondent alleged in reply that aside from his legitimation of the child he and his wife had also adopted it by appropriate judicial proceedings, so that in addition to becoming legitimated it had become the child of himself and wife by such adoption. It appeared that the natural mother had not given her consent to its judicial adoption or forfeited her right to refuse such consent, but respondent contended that by his legitimation of the infant he had acquired such rights as rendered its adoption valid by his consent alone, since the statutes of the state provided that the natural parents of a child adopted by judicial decree were deprived of all legal rights. But the court said (at page 937 of 109 P.) that under the statute providing for legitimation the child was legitimated rather than adopted (citing Blythe v. Ayres, supra), and that adoption could not be legally made where the parents of a legitimate, or the mother of an illegitimate, child were living and had not consented. It added: "We have found no foundation for the claim that all rights on the part of the mother of an illegitimate child, consistent with its best interests, are lost in the mere exercise by the father of his right of legitimation. The interests of the child are of first and controlling importance." Also it said that while, under section 4899 Comp. Laws of Okla. 1909, 10 O.S. 1941 § 5, the father of a legitimate unmarried minor child was entitled to its custody and earnings, and the reciprocal rights and duties between father and child were the same as those existing between legitimate parents and their legitimate children, still, "As to its mother, when her rights are involved, it is an illegitimate child, and the law is that an illegitimate minor child cannot be adopted without the mother's consent, and that which cannot be done directly cannot be done indirectly. Except for the legitimating statute, no one could have disturbed this woman's complete right of custody in and to her child, and in our judgment it would be a strained and unnatural construction of this statute and the rights of the parties under it to yield to the contention of counsel for defendant, for 'the law should never receive such a construction as would tend to dry up the sources of natural affection.' Barela v. Roberts, 34 Tex. 554. If the mother desires to give her consent to adoption, she of course may do so, but she cannot be lawfully stripped of her inherent right to say *no*." The right of the mother to have access to and to visit her child was affirmed. Also the court, in disposing of respondent's contention that Mrs. Allison should have been made a party to the proceeding, said at page 941 of 109 P.: "Mrs. Allison is not a necessary party in either of these cases. *The child by the act of the father was not made her heir.* Barnes et al. v. Allen et al., 25 Ind. 222; Keith et al. v. Ault et al., 144 Ind. 626, 43 N. E. 924. *Nor did it enter her household as her child.* The statute under which it was legitimatized would have been rendered in very many instances nugatory and its effectiveness largely curtailed, if acting under it the child to be legitimated were to take as an heir of the wife of its father, as but few if any wives could be found who would consent to receive into their homes such children when to do so would make them heirs equally with their own children, and in practically all of such cases the wife would refuse to permit its entrance in the family. The legitimation of the child under this statute was accomplished by the father, and the wife's sole connection with the transaction was the giving of her consent to its reception into the family, where it might be treated as if it were legitimate." (Italics added.)

Another Oklahoma case, also cited by appellant, which tends to clarify the meaning and effect of legitimating statutes is Templeman v. Bruner, 42 Okl. 6, 138 P. 152, 139 P. 993, which upheld the right of the mother of an illegitimate child which had been legitimatized by its father, to inherit an Indian allotment from the child to the exclusion of the father. The court cited and quoted from Allison v. Bryan to the effect that the status of the child as an illegitimate child of its mother was not affected by the legitimation by its father, saying that where the rights of the mother were involved the child was still illegitimate and under the statutes of the state its mother was entitled to inherit from it as an illegitimate child.

The scope of the decision in Allison v. Bryan, supra, is stated in Re Buffington's Estate, 169 Okl. 487, 38 P.2d 22, where it was held that decedent Buffington had legitimated a son prior to his marriage to the widow who survived him, and that such legitimated child was entitled to share in his estate. Claimants opposing the rights of the son contended that he had never been legitimated as he had not remained in his father's home. Certain language used in the Allison case to the effect that a legitimated child should remain in the home of its father was there relied upon by appellants as it is in this case. There the court said at page 26 of 38 P.2d: "The question of the right of the respective parents to the care and custody of the child after such adoption is clearly a question apart from that of adoption itself and depends largely upon what is for the best interest of the child, and that was in fact the only question decided in the Allison case, for there the adoption was a conceded fact."

[4, 5] It therefore appears that even in Oklahoma, where the statutes, following the common law rule, gave the father of a legitimate, or legitimated, child the superior right to its custody, the courts may, nevertheless, in a contest between the natural mother and the father of a legitimated child, award the custody to the one or to the other as the best interests of the child dictate. More clearly then, should such be held to be the power of the courts of this state in view of the provisions of section 197 of the Civil Code, supra. And the trial court in this case, having determined that the child's welfare will be best served, for the present at least, by leaving her with her mother, its determination, if supported by evidence, is conclusive upon this court unless a clear case of abuse of discretion is shown. Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268. No such abuse is shown here. The evidence shows that the child had always been in the care of her mother who had amply provided for her present as well as her future welfare, and until the child was brought to Sacramento in June, 1945, to visit her father, petitioner had not, since she was nine months old, seen or communicated with her, or contributed anything to her support. The evidence shows that the mother is industrious and has had and now has lucrative employment. Also, section 138 of the Civil Code provides that other things being equal, the custody of a child of tender years should be given to the mother.

The order appealed from is affirmed.

THOMPSON, J., concurs.

PEEK, Justice.

I dissent. As I interpret the majority opinion it holds that legitimation of a child under section 230 of the Civil Code does not amount to an adoption in the full sense of that term but merely changes "its status from that of an illegitimate child to that of a legitimate one" and the child thereby becomes "the legitimate child of both of its natural parents." From this premise the majority holds that upon the question of custody (which is the primary issue before this court) "neither of such [natural] parents has a superior right to its custody * * *." In support thereof the majority cites the case of Munson v. Munson, 27 Cal.2d 659, 166 P.2d 268, wherein the Supreme Court stated that the trial court having found upon sufficient evidence that it was for the best interest of the child that custody be awarded to the father, such finding cannot be disturbed. Relying upon the cited case the majority herein then states that "The trial court in this case, having determined that the child's welfare will be best served, for the present at least, by leaving her with her mother, its determination, if supported by evidence, is conclusive upon this court unless a clear case of abuse of discretion is shown." The opinion concludes that the determination of the trial court is supported by sufficient evidence, that no abuse of discretion is shown, and that under section 138 of the Civil Code, everything else being equal, the custody of a child of tender years should be given to the mother.

I cannot agree with such conclusion. I believe that section 230 is an adoption as well as a legitimation statute, that it does more than merely change the status of the child from illegitimacy to legitimacy in that it also effects a change in the relationship of the child toward each of its natural parents, conferring upon the father who has received the child into his custody and his wife who has consented thereto a prima facie right to custody and to the retention of that custody unless and until he or she is shown to be unfit, under the rule of Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, and cases cited therein, as distinguished from the rule in the Munson case, where the contest was between husband and wife over the custody of a child born during their marriage, there being no third person involved and no change in relationship.

This conclusion is fortified by two recent decisions of the courts of this state which are given only passing mention in the majority opinion, namely, Jenkins v. City of Los Angeles, decided by Division 3 of the Second District, July 1943, and reported in 60 Cal.App.2d 50, 140 P.2d 45, and In re Estate of Lund, decided by the Supreme Court, May 1945, and reported in 26 Cal.2d 472, 159 P.2d 643, 162 A.L.R. 606. It is true, as observed by the majority opinion herein, that the first of these cases relates to the right of a child to a pension upon the death of its father, that the second case relates to the right of a child to inherit from its father, and that in neither case was the precise question here in issue considered. However, inasmuch as the present case is one of first impression in this state, those decisions which announce or discuss the basic principles which necessarily must govern the disposition of the present case, should not be disregarded.

The Jenkins case, in dealing with a particular right which flows from a legitimation under section 230, discusses generally the rights which said section confers, and declares that those rights are the same as in the case of any other adoption. Thus the court therein, after referring to what it terms the "forceful and all-inclusive" wording of said section, states: "We do not doubt that the section was intended to mean just what it says." Additionally, after indicating some of the rights flowing from the legal relation of parent and child which an adoption by court order establishes, declares: "An adoption under section 230 of the Civil Code is no less potent." Throughout its opinion said court treats the legitimation as a species of adoption effectuated by the acts of adoption and the force of a self-executing statute. Thus the court says: "But at the time of the death of Charles S. Jenkins, respondent herein was his legitimate child by virtue of acts of adoption as found by the court and the force of the statute." 60 Cal.App.2d at pages 52, 53, 140 P.2d at page 46.

The case of In re Estate of Lund, supra, while dealing primarily with a question of inheritance, nevertheless contains an exhaustive and well considered discussion which encompasses virtually the entire subject of the operation and effect of section 230. Therein, among other things, are emphasized the liberal policy which the legislature and courts of this state have established with regard to adoption by legitimation, and also the integral nature of the family relationship which such an adoption creates.

It appears to me that the comprehensive opinion in the Lund case makes unnecessary the strong reliance which the majority opinion places on the dictionary definitions which it quotes from the case of Blythe v. Ayres, 1892, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40. The majority by so doing, I feel, has failed to appreciate what to me is the true significance of the interpretation which the Supreme Court in the much later Lund decision gave to such language, when, after carefully analyzing the same, it stated in summation: "So considered, it becomes the more obvious that it is reasonable to conclude that the Legislature by declaring in section 230 that 'The foregoing provisions of this chapter do not apply to such on adoption,' i. e., to *legitimation*, meant to confer the broad benefits of that procedure without the limitations express or implicit in ordinary adoption proceedings." 26 Cal.2d at pages 492, 493, 159 P.2d at page 654, 162 A.L.R. 606.

Another result of the failure of the majority to construe our statute as it has been interpreted in the Lund and Jenkins cases is that it thereby is compelled to rely upon authorities from other jurisdictions which concededly are predicated on statutes different from our own and which, therefore, may not be relied upon. In so doing the opinion must perforce disregard the matter of local public policy, cogently expressed in the Lund decision in connection with this very subject as follows: "We deem it uncontestable that each state may formulate its own public policy in respect to legitimation and can enact laws to carry out its policy." And, quoting with approval from Blythe v. Ayers, supra, "'Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it * * *.'" 26 Cal.2d at pages 485, 486, 490, 159 P.2d at pages 651, 653, 162 A.L.R. 606.

A similar sentiment is voiced in the Jenkins case, wherein the court, after quoting the language of section 230, says: "This has been the law for three-quarters of a century and it is not to be presumed that in adopting their charter the people of Los Angeles held an unsympathetic attitude toward this humane policy of the state." 60 Cal.App.2d 52, 140 P.2d 47.

Specifically, then, in holding that section 230 is not an adoption statute and does not confer on the legitimating father the broad benefits which adoption proceedings generally confer on the adoptive parents, namely, the prima facie right to the custody of the child, the majority opinion runs directly counter to the unmistakable language previously quoted from the Lund case to the effect that the legislature by the wording of said statute meant to confer by the acts of adoption by legitimation the broad benefits of that procedure "without the limitations express or implicit in ordinary adoption proceedings."

In other words, the majority opinion, by differentiating adoption by legitimation under section 230 from adoption by a court proceeding, relying upon the language in the Blythe case which, as previously mentioned, was quoted and analyzed in the Lund case, proceeds to determine that the rights of and the correlative duties toward, a child that has been adopted by legitimation are less comprehensive than those which attach where a stranger to the blood has been adopted. Yet the Supreme Court in the Lund case arrived at precisely the opposite conclusion in considering the same language quoted from the Blythe case, namely, that the difference between adopting a blood relative and a stranger to the blood should militate more liberally in favor of the legitimated child and without the restrictions imposed in the case of an adoption of a non-relative. Thus the limitation that an adult child may not be adopted by court proceedings was held not to apply to a natural child adopted by legitimation under said section 230. However, the result of the rule of the majority opinion would be that a father who wished to adopt his illegitimate minor child into his family and have at least the prima facie right to custody which a stranger adopting the child would have, would be required to follow the formal procedure outlined by the sections of the Civil Code preceding section 230—which is the very thing that section 230 says does not have to be done.

By other language in said section 230, the wife of the child's father is expressly made a party to the legitimation to the extent that her consent must be given before the child may become a part of the family, which provision thereby makes the wife a definite member of the family unit. The majority opinion disregards the presence of this essential requisite entirely, for, if she is not to share in the duties, responsibilities and rights, including that of custody of the child who has become a part of her household, it is difficult to understand the reason for making mandatory her acquiescence, and consequently the language of the statute becomes meaningless.

The majority opinion likewise—and this seems to me particularly noteworthy—fails to take into consideration the fact that the reception of a minor child (in this case a child of seven and one-half years) into a family necessarily contemplates the taking over of the custody of such child, and that it is the intendment of section 230, as construed by the Supreme Court in the Lund case, that such reception—and therefore such custody—shall be permanent and continuing and not merely temporary and transient.

"Once a child had been unconditionally received into the family, he was received permanently and continuingly unless and until such reception was revoked (if in its nature it could be revoked) * * *." In re Estate of Lund, supra, 26 Cal.2d at pages 495, 496, 159 P.2d at page 656, 162 A.L.R. 606.

"The biological relationship of father and son, and the de facto family relationship which the father had established, are not transient or volatile things which may exist one moment and be nonexistent the next, or which depend for their continuance upon repetitions of the original words or acts. Once proclaimed and established they exist as facts for all time and in all places." In re Estate of Lund, supra, 26 Cal.2d at page 496, 159 P.2d at page 656, 162 A.L.R. 606.

Indeed, the language of section 230 which makes the child legitimate "for all purposes"—which, as has been seen should be interpreted as meaning likewise "adopted for all purposes", would seem to comprehend the taking of custody as one of the purposes or incidents of an adoption by legitimation.

It must be conceded to be the law that in the case of ordinary adoption proceedings, upon the adoption of the child the rights of the natural parents cease and the adoptive parents become in the eyes of the law the only parents whose rights must be considered. In re Estate of Jobson, 164 Cal. 312, 316, 317, 128 P. 938, 43 L.R.A.,N.S., 1062; Younger v. Younger, 106 Cal. 377, 379, 380, 39 P. 779; Mitchell v. Brown, 18 Cal.App. 117, 125, 122 P. 426. Therefore it would seem to follow that any question between parents that may now arise would be solely between petitioner and his wife, and not between petitioner and respondent. Since an adopted child becomes the child not of one but of both adoptive parents, and since in the case of an ordinary adoption one of the rights that a natural parent loses or relinquishes in favor of the adopted parent or parents is the right to the custody of the child, therefore, "From the time of the adoption, the adopting parent is so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment, the parent by blood ceases to be, in a legal sense, the parent. His place has been taken by the adopting parent." In re Estate of Jobson, supra, 164 Cal. at pages 316, 317, 128 P. at page 940, 43 L.R.A.,N.S., 1062. See also Civil Code sections 228, 229.

That the same result follows from an adoption by legitimation was in effect decided in the early case of Graham v. Bennet, 2 Cal. 503, 506, 507, wherein the court declared that legitimation pursuant to a void marriage under section 2 of the Act to Regulate Descents and Distributions, which is now section 85 of the Civil Code, gives to the father "the unquestioned right to their custody, control and obedience."

The entire tenor of the opinion in the case of In re Estate of Lund, supra, strongly points to a like result in the case of a legitimation pursuant to section 230 of the Civil Code. For instance, the court in that case observed: "Here the petitioner was received into the intimate family circle, the household itself; he became as much a member of the family as was his half-brother Frank or his half-sister Blanche." 26 Cal.2d 494, 159 P.2d 655, 162 A.L.R. 606. If therefore in the present case Josephina became a part of petitioner's family pursuant to the procedure taken under section 230, as the trial court in effect found she did, it was because the law invested petitioner with the right to treat her as a part of his family which in the case of a minor child includes the right to custody.

There appears to be nothing in sections 197 and 200 of the Civil Code which militates against the application in the present case of the general rules governing custody in cases of adoption. Section 200 has no bearing on the question, as Josephina is not an illegitimate child, but, as found by the trial court, a legitimate child. Likewise, section 197 has no application, because there is here no controversy between the father and his wife, who stands in loco parentis as the child's mother.

If it be insisted that the term "mother" as used in said section 197 refers to the natural mother, then it must be held that the case comes within the exception "If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."

Moreover, even if the rule rather than the exceptions stated in section 197 were otherwise applicable to the situation in the present case, still the result would be that such general rule must be deemed to be modified by the provisions of the special statute governing adoption by legitimation—a matter that will be discussed hereinafter.

The majority states: "Certainly the statute does not mean that the child becomes the child of the wife of its father when the father has married one other than its mother." However, the authorities cited do not support the statement. In re Estate of Flood, 217 Cal. 763, 780, 21 P.2d 579, 585, carries an implication to the contrary, it being said that "Flood, a married man, maintained *a family, consisting of his wife and petitioner* (the child), and, to this family and to persons who visited and associated with it, he declared the relationship." (Italics added.) Also, it does not appear that the cited case of Keith v. Ault, 144 Ind. 626, 43 N.E. 924, is in point, for in that case the marriage of the child's father took place after the adoption. Obviously, where the adopting father afterward marries a woman who was not a party to the adoption proceedings, the new wife does not incur the responsibilities or acquire the rights of an adoptive parent. The same essential difference in factual situation appears to have existed in the case of Barnes v. Allen, 25 Ind. 222. See Paul v. Davis, 100 Ind. 422, 426, also cited in the majority opinion and included in a quotation from the opinion in Allison v. Bryan, 26 Okl. 520, 109 P. 934, 138 Am. St.Rep. 988, 30 L.R.A.,N.S., 146. However, the Indiana Supreme Court, in the Keith case, supra, recognizes the fact that a different rule might obtain in a case where the adopting father was married prior to the adoption. Thus said court stated: "Had James H. Lemmon been married before his marriage to Mary A. Lemmon, had appellant been adopted by him and his former wife, and had Mary A. Lemmon been a second and childless widow, as was the case in Markover v. Krauss, supra, [132 Ind. 294, 31 N.E. 1047, 17 L.R.A. 806], then we should have another question, and one not under the statute here under consideration, but under section 2644, Rev.St.1894 (section 2487, Rev.St.1881)." 43 N.E. 925.

The last case cited by the majority opinion on this point, Serway v. Galentine, 75 Cal.App.2d 86, 170 P.2d 32, does not appear to touch any of the questions involved herein. As far as implications therein are concerned, they are all to the effect that the family into which the child may be received under section 230 may consist of the adopting father and the woman with whom he is living without having been legally married, and who is not the natural mother of his child. See, In re Estate of Gird, 157 Cal. 534, 545, 108 P. 499, 137 Am.

St.Rep. 131, quoting from Garner v. Judd, 136 Cal. 394, 68 P. 1026, cited in the Serway case, 75 Cal.App.2d at page 90, 170 P.2d at page 35.

Neither do I believe that the foregoing cases support the further statement in the majority opinion: "Nor does such child legitimated by its father acquire rights of inheritance from its father's wife." This question is one which appears not to have been answered in this state. (See 29 Cal. Law Rev., pp. 187-191). Moreover, if the answer should be the one which the dictum in the majority opinion declares, this would result solely from the operation of a special statute, namely, section 255 of the Probate Code, and not from the general provisions of the legitimation or adoption laws.

The majority opinion does not mention the comparatively recent case of Fladung v. Sanford, 51 Ariz. 211, 75 P.2d 685, which factually bears a close resemblance to the present case and which involves a statute substantially identical with section 230 of the Civil Code. On the other hand, the opinion gives undue weight to the decision in Allison v. Bryan, 26 Okl. 520, 109 P. 934, 138 Am.St.Rep. 988, 30 L.R.A.,N.S., 146, which is based on a narrower statute and appears to be out of harmony not only with the liberal policy established in this state but also with that which now obtains generally in the majority of jurisdictions.

This is pointed out in the annotation in 114 A.L.R. 271, wherein the author says:

"It has been held that the mother of an illegitimate child, by consenting to a deed of adoption by its natural father which relates solely to the child's right of inheritance from its father, and which is by its terms limited according to the provisions of a statute *which does not undertake to establish the relation of parent and child further than to give the child a right of inheritance*, does not thereby yield her rights under a statute providing that an illegitimate child cannot be adopted without the consent of its mother, and hence she is entitled to an order enforcing her right to visit the child, and to have the child visit her. Allison v. Bryan, 1910, 26 Okl. 520, 109 P. 934, 138 Am.St.Rep. 988, 30 L.R.A.,N.S., 146.

"Adoption statutes are not generally regarded as intended to make a complete change in the common law; and the prevailing tendency at the present time is in the direction of a liberal construction. 1 Am.Jur. Adoption of Children, p. 625. And it is a general principle that a statutory proceeding of adoption, when legally conducted, terminates absolutely all legal relations between the minor and his natural parents or former legal guardian. 1 Am. Jur. Adoption of Children, p. 650." (Italics added.)

It may be observed in passing that preceding the footnote referred to in the American Law Reports, Vol. 114, supra, is a report of the interesting decision of Spencer v. Franks, 173 Md. 73, 195 A. 306, 114 A.L.R. 263, which holds that without giving a right to general custody a provision in a decree permitting a right of visitation is prejudicially erroneous. This holding, if followed in the case at bar, would make the decree herein invalid, and at least require a modification thereof.

If I am correct in concluding that an adoption by legitimation carries with it the benefit of all the incidents of an adoption by court order, and the prima facie right to custody in the adopting parent is one of those incidents, then it follows as between petitioner, as the legitimating and adopting father, and respondent, as the erstwhile parent from whom the child has been adopted and who is now in contemplation of law a stranger to the family of which the child has become a member, petitioner must be recognized as having the prima facie right to such custody, in the absence of a showing of unfitness to assume it.

This is clearly the rule in the case of an ordinary adoption. As the Supreme Court stated in the case of In re Santos' Estate, 185 Cal. 127, 132, 195 P. 1055, 1057: "The persons adopting the child acquire the paramount right to the custody of the child, for, after the adoption, they occupy the position of parents, and shall 'have all the rights and be subject to all the duties of that relation.' (Civ.Code, § 228.) The right of parents to the care and custody of their child yields only for the most cogent and compelling reasons, to wit, in case the parents are shown by clear evidence not to be fit or proper persons to have such custody. [In re] Guardianship of Akers, [184 Cal. 514] 194 P. 706; Ex parte Brown, 98 Kan. 663, 159 P. 405."

And again in Bell v. Krauss, 169 Cal. 387, 391, 146 P. 874, 875, it was said: "Prima facie a parent is presumed competent, and he is entitled to have the custody of his child, unless found by the court to be incompetent. In re Campbell ['s Estate], 130 Cal. 380, 383, 62 P. 613."

In fact the rule is not confined to cases of adoption, but extends to all cases where the question of the custody arises as between a parent and one who does not sustain a parental relation to the child. Roche v. Roche, 25 Cal.2d 141, 143, 152 P.2d 999; Stever v. Stever, 6 Cal.2d 166, 169, 56 P.2d 1229; Newby v. Newby, 55 Cal.App. 114, 202 P. 891. In the Roche case the court stated: "In the case of Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, this court held that section 197 of the Civil Code should be construed with subdivision 1 of section 246 of said code, (now section 1406 of the Probate Code) and they contemplate that the natural right of a parent to the care of a minor child, if a fit and proper person, shall prevail as against an entire stranger, the law presuming, in the absence of either evidence or findings showing the contrary, that either parent is a proper person to whom the minor's care should be awarded * * *."

If, then, the provisions of section 197 which the majority opinion purports to follow must be read with and deemed modified by the code provisions relating to guardianship, as was held in the Stever case, supra, 6 Cal.2d at page 169, 56 P.2d 1229, and if the provisions of said section 197 must be read with and deemed modified by the code provisions relating to adoption by court order—specifically section 228 of the Civil Code—as was held in the case of In re Santos' Estate, supra, 185 Cal. at page 132, 195 P. 1055, then logically it would seem to follow that the provisions of section 197 must be read with and deemed modified by the provisions of section 230 of the Civil Code relating to adoption by legitimation.

As so read and so modified, said provisions invest petitioner as the natural father of the child with the presumption of competency and fitness, or, as stated in the Roche and Stever cases, supra, of being a proper person to whom the minor's care should be awarded, in the absence of either evidence or finding showing the contrary.

This I believe is the principle that should have been applied herein, and not the rule of the case of Munson v. Munson, supra, which obtains as between divorced or separated parents *where there has been no change in the relationship of the child toward either of them.* But where there has been a change in such relationship, as in the case of a guardianship, an adoption by court decree, or an adoption by legitimation, the rule of the Roche and Stever cases should be applied and not that of the Munson case.

On the hearing below the trial court did not find that the petitioner was unfit or incompetent to have the custody of his child. To the contrary, the court granted him "the right * * * to visit the child at reasonable times and possibly to have the child with him occasionally at such times as would not interfere with the welfare and best interest of the child." Likewise the court was of the opinion that "From the moral aspects of the situation as disclosed by the evidence, there is little choice as between the father and the mother."

It follows that the trial court was not warranted in endeavoring to apply the rule of the Munson case of balancing conveniences or supposed advantages to the child and then depriving petitioner of the right to custody to which as an adoptive parent he is entitled, *unless* found to be unfit. Instead, said court should have determined whether the petitioner is a fit and proper person to have the custody of his daughter Josephina and to retain her as a member of the family into which she had been received.

Therefore, I believe the judgment should be reversed and the cause be remanded to the trial court with instructions to receive further evidence directed to said issue and to make a determination thereon.

In re VAN DEUSEN'S ESTATE.

BRIGHT et al. v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N.*

Civ. 15553.

District Court of Appeal, Second District, Division 1, California.
Dec. 30, 1946.
Rehearing Denied Jan. 17, 1947.
Hearing Granted Feb. 27, 1947.

1. Wills 🔑**488**

Where meaning of will is entirely clear from its language and no latent ambiguity is shown, evidence of extrinsic circumstances is inadmissible to show that testator intended something not expressed. Probate Code, § 105.

2. Trusts 🔑**119**

Extrinsic evidence is admissible to determine the purpose and general intention of trustor where purpose for which trust was created is not expressed in instrument creating it.

3. Trusts 🔑**58**

Where trustor's purpose or plan would be thwarted by slavish adherence to terms of trust, equity may modify such terms.

4. Trusts 🔑**58**

Where equity, because exigencies not contemplated by trustor have arisen, is called upon to modify terms of trust in order that trustor's purpose or plan may not be thwarted, court must, as far as possible, occupy the position of trustor and do what he would have directed had he anticipated the emergency.

5. Trusts 🔑**119**

An essential of a voluntary trust is the purpose thereof, and if such purpose is in controversy, parol evidence is admissible to supply, in respect to such purpose, what was omitted from instrument creating the trust. Civ.Code, § 2221.

6. Wills 🔑**487(1)**

Will devising estate to trustee to pay net income to named daughters during life and upon death of survivor to divide corpus among then living grandchildren and issue of any deceased grandchild did not disclose purpose for which trust was created and hence parol evidence of circumstances under which will was made and testatrix' declarations of purpose to provide for daughters was admissible to determine whether corpus should be invaded in order to provide adequately for the daughters. Civ.Code, §§ 1647, 2221.

7. Trusts 🔑**112**

The rule that contracts must be construed precisely as made and not modified by the courts does not apply to declarations of trust where primary purpose of trust would not be accomplished by strict adherence to terms of declaration.

8. Contracts 🔑**175(2)**

Evidence of surrounding circumstances, though inadmissible to add to or take away anything from terms of written contract, is admissible to dispel doubt appearing upon the face of contract itself, not by showing that the parties meant something other than what they said but by showing what they meant by what they said. Civ.Code, § 1647.

9. Trusts 🔑**58**

Where testatrix' primary purpose in devising estate to trustee to pay net income to two daughters for life and upon death of survivor to divide corpus among then living grandchildren and issue of any deceased grandchild did not appear from will, but was shown to be to provide for daughters, at least $200 per month was needed to provide adequately for such daughters and properly constituting corpus of trust was sufficient when will was executed to produce approximately $400 per month, superior court was justified in ordering recourse to corpus if necessary in order to pay each daughter $200 per month.

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* Subsequent opinion 182 P.2d 565.

10. Trusts ⚷58

Where income from testamentary trust was insufficient to carry out testatrix' purpose of providing for needs of daughters who, under terms of will, were to receive only the net income, superior court had jurisdiction to order recourse to the corpus in order to provide adequately for testatrix' daughters even though one of the residuary beneficiaries was a minor, the interests of such minor being represented by the trustee who vigorously opposed invasion of the corpus. Probate Code, § 1120.

11. Courts ⚷198

The statute providing for retention of jurisdiction where testamentary trust continues after distribution was intended to broaden the jurisdiction of probate court so as to give that court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries under the trust. Probate Code, § 1120 .

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Florence Lenore Van Deusen, deceased, wherein Gladys Van Deusen Bright and another filed a petition, opposed by Bank of America National Trust & Savings Association, asking that the trustee under decedent's will be directed to pay at least $200 per month to each petitioner, even though invasion of corpus of trust should be necessary to make such payments. From an order directing such payments, the Bank of America National Trust & Savings Association appeals.

Order affirmed.

William K. Young, of Los Angeles, for appellant.

Ben C. Cohen, of Los Angeles, and Leonard Hartigan, of Glendale, for respondents.

WHITE, Justice.

By her will dated June 20, 1932, Florence Lenore Van Deusen left the residue of her estate (after certain minor bequests) to American Security and Trust Company, in trust, to hold, manage and invest the same, and "to pay over the net income arising therefrom, in equal shares, unto my aforesaid daughters, Gladys Van Deusen Bright and Hazel Van Deusen Lee" (petitioners and respondents herein), "during the period of their joint lives, and in case of the death of either of them, then all of said net income unto the survivor, for and during the natural life of such survivor." The will further provided that upon the death of the survivor of the two daughters the trust should cease and the entire fund be paid in equal shares to the grandchildren of the testatrix then living, any surviving issue of a deceased grandchild to take per stirpes the share the deceased grandchild ancestor would have taken if living. Upon the death of the testatrix in 1944, the will was admitted to probate, and the named trustee declining to act, the appellant herein, Bank of America National Trust and Savings Association, was appointed administrator-with-the-will-annexed. In due course the estate was distributed to appellant bank as trustee. Thereafter the respondent daughters filed their petition for an order directing the trustee to pay to each of them the sum of $200 per month from the net income of the estate and further providing that should the net income be insufficient for this purpose the deficiency should be paid from the corpus of the trust. From the order granting such petition this appeal is prosecuted.

In their petition respondents alleged that it was contemplated by the testatrix during her lifetime that the provision she had made for her daughters was such that the net income of the trust investments would be sufficient to provide for their needs and that neither of them would be in want; that the testatrix believed that at least $200 per month would always be available for each of her daughters from the net income of the trust and believed and intended that not less than said sums should be paid, regardless of whether the net income should be sufficient therefor; that said sums would amply provide for her daughters and were necessary to maintain them. Respondents then alleged that since the creation of the trust the daughter Gladys Van Deusen Bright has been afflicted with a disease believed to be incurable, and in the treatment thereof she has been required to employ specialists and secure special care and attention, and will in the future require special attention and possible hospitalization at great expense; that the daughter Hazel Van Deusen Lee, by reason of her health and advanced years, is unable to work or provide for herself and must rely upon the income from the trust to provide her with the necessities of life and the station to which she has been accustomed.

It was further alleged that the primary purpose of the trust was the safeguarding of the daughters from penury due to lack of funds with which to provide their reasonable needs, "among which said testatrix always regarded medical care and attention as essential and had in mind that during the declining years of said petitioners their lives should be made as comfortable as possible. That the aforesaid avowed purpose and object is failing of accomplishment and cannot be fulfilled * * * unless petitioners each derives at least $200 per month from said trust. * * * That in providing for said trust, it was contemplated by petitioners' mother that if it should become necessary to use a portion of the corpus of said trust to supply petitioners with their needs, essential advances should be made, if necessary, from the corpus of said trust for the purpose of accomplishing the purpose thereof when, as and if required."

In support of the petition, T. J. Bright, a retired Navy commander, testified that he was the husband of the daughter Gladys Van Deusen Bright; that the decedent confided in him concerning her business affairs and he counselled her concerning her investments; that at the time of the creation of the testamentary trust in 1932, the yield on decedent's securities was approximately $400 per month; that the income has dropped a great deal since that time; that about the time of the creation of the trust decedent told him she expected her daughters would enjoy an income of $200 per month each; that she wanted them always taken care of; that she confirmed these expressions in a letter; that in a letter received from decedent about September 6, 1943, she stated, "I will arrange it that it will be used to the advantage of Gladys and Hazel, no others"; that decedent "did make a statement with respect to seeing that her children were not impoverished as a result of illness, or any unforeseen contingencies."

No issue was raised by the trustee as to the need of the respondents, and it was stipulated by the trustee that if relief could properly be granted the sum of $200 per month was a reasonable amount.

The trial court made findings of fact in accordance with the allegations of the petition hereinbefore set forth, and further, "that the main benefits under said trust were intended for the petitioners herein who were the primary objects of the testatrix' solicitude and that the primary purpose of the trust could not be accomplished by a strict adherence to the terms of the declaration of the trust * * * and that it is the purpose of said trust that the said petitioners herein receive the sum of $200 each per month * * * and that unless each of the petitioners receives the sum of $200 per month the object and purpose of the creation of said trust will be defeated."

[1] Appellant first contends that the trial court erred in admitting evidence of the testatrix' intentions, citing authorities to the effect that where the meaning of the will is entirely clear from its language and no latent ambiguity is shown, evidence of extrinsic circumstances may not be received to show that the testatrix intended something not expressed. Prob. Code, Sec. 105; Estate of Chamberlain, 46 Cal.App.2d 16, 115 P.2d 235; Gore v. Bingaman, 29 Cal.App.2d 460, 469, 470, 85 P.2d 172.

[2] Respondents urge that the purpose for which the trust was created was not expressed in the instrument, and that in such circumstances extrinsic evidence is admissible to determine the purpose and general intention. Estate of Easterday, 45 Cal.App.2d 598, 114 P.2d 669; Taber v. Bailey, 22 Cal.App. 617, 620, 135 P. 975; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; 2 Rest. Trusts, 1022.

The intention and purpose of the trustor, as found by the court, was to secure her daughters against want. Such purpose cannot be carried out if the terms of the trust permitting payments to be made from the income only must be adhered to.

[3] A court of equity may modify the terms of a trust when the purpose or plan of the trustor would be thwarted by a slavish adherence to the terms of the trust. Adams v. Cook, 15 Cal.2d 352, 359, 101 P.2d 484; Pennington v. Metropolitan Museum of Art, 65 N.J.Eq. 11, 55 A. 468; 65 Cor.Jur. 792; Mertz v. Guaranty Trust Co., 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114; Marsh v. Reed, 184 Ill. 263, 56 N.E. 306.

If there is any substantial competent evidence to support the trial court's finding in the instant case that the primary "purpose" of the testatrix was to provide for her children and secure them against want in their old age, then under the authorities cited the trial court was warranted in permitting an invasion of the principal of the trust for that purpose. The only evidence of such "purpose", aside from permissible inferences to be drawn from the document itself, is that of the testatrix' declarations, hereinbefore narrated.

[4] The powers and duties of the court with regard to the modification of trusts are thus stated by our Supreme Court in the case of Adams v. Cook, supra, 115 Cal.2d at page 360, 101 P.2d at page 488, wherein approval is given to the following language taken from Curtiss v. Brown, 29 Ill. 201: "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."

In the instant case it seems only reasonable to assume that had the testatrix at the time her will creating the trust was executed, or at any time thereafter during her lifetime, had any knowledge that economic conditions would deplete the yield from the corpus of the trust to the extent that her daughters would be reduced to the necessitous circumstances in which they now find themselves, she would have had the trust provisions of her will provide for relief against such misfortune in the lives of her daughters. This we say because the great weight of the evidence, if such evidence of her declarations is admissible, shows that the testatrix did not intend that her daughters should in their old age be without means of support if for any reason the income from the trust should fail. One of her leading, if not her main, purposes, according to the foregoing testimony, was that the necessary means of support for her daughters should be furnished by her estate in any event. That this purpose cannot be executed in the particular manner she intended furnishes no valid reason why it should not be executed at all.

[5] One of the essentials of a voluntary trust is the "purpose" thereof. Civ.Code, sec. 2221. If it can be said that the "purpose" of the trust is in controversy, then parole evidence was admissible to supply, in respect to the "purpose", what was omitted from the document creating the trust. Appellant, however, insists that the will here involved is not deficient as to the plan or purpose of the testatrix; that such plan or purpose was to vest her estate in a trustee during the lifetime of her daughters, with directions to pay the net income to them, and upon their deaths to distribute the corpus to the grandchildren. But there is no indication in the will that the testatrix desired and intended that all of the corpus existent at the time the trustee took over should go without impairment to the contingent beneficiaries. In other words, what her plan or purpose was is not manifest from a reading of the testamentary document. Respondents herein, as the daughters of the testatrix, were the natural objects of her bounty, and to assume that in providing for their care through income from the corpus, which at the time she executed her will was yielding $400 per month, she intended that even though the income might shrink to an amount totally inadequate to provide the

necessities of life for her daughters, thereby reducing them to penury, the principal should nevertheless remain intact, would do violence to the usual propensities and natural impulses of a mother. Certainly the testamentary document herein manifests no such purpose with reference to the trust therein created. The purpose for which the trust was created, and the motive which prompted it, not being expressed in the instrument, extrinsic evidence was admissible to determine the purpose and general intention. Estate of Easterday, supra; Taber v. Bailey, supra; Booth v. Oakland Bank of Savings, supra; 2 Rest.Trusts 1022; Jordan v. Price, Ohio App., 49 N.E. 2d 769; Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S.W. 537, 38 A. L.R. 937.

[6, 7] Without fear of contradiction, it can certainly be said in the instant case that the will creating the trust does not disclose what motive prompted the testatrix to deliver her estate to the trustee to hold. Furthermore, "* * * The rule against courts modifying the terms of a contract, and that they should construe it precisely as the parties had made it, does not apply to declarations of trust, where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and that when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by 'a slavish adherence to the terms of the trust', the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors. This rule does not run contrary to any of the canons of construction of contracts contained in the Civil Code of this state, as these sections of the code are applicable to the legal interpretation of contracts as expressed by the parties, and have no reference to the equitable powers of a court of equity to modify the terms of a trust indenture in order to meet exigencies that have later arisen and which, unless the trust were modified, would defeat the prime purpose for which it was created." Adams v. Cook, supra, 15 Cal.2d at page 361, 101 P.2d at page 489.

[8] And even the strict rule with reference to the interpretation of a contract permits of explanation "By reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, sec. 1647. Evidence of "surrounding circumstances" is not admissible in connection with a written contract to add or take away anything from the terms, but this rule of evidence is invoked in cases where upon the face of the contract itself there is doubt, "to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said." United States Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 84, 141 P. 917, 920. So in the instant proceeding, evidence was not admitted for the purpose, nor would it have the effect, of varying the terms of the will. It was admitted for the purpose of interpretation and to establish the "purpose" and motive of the testatrix which were not disclosed in the testamentary document.

In the case at bar it is conceded that at the time of the execution of the will here in question the yield from the properties constituting the corpus of the trust was $400 per month. Manifestly, the testatrix' "purpose" was to provide her daughters with such a sum each month for their maintenance and support. At the time of the hearing of the instant proceeding in the court below, the value of the corpus of this trust was about $100,000. The contingent beneficiaries are the grandchildren of the testatrix, who are children of the two daughters named as beneficiaries of the income from the trust. Two of the grandchildren appeared in this proceeding through counsel and offered no objection to increasing the allowance to $150 per month, while the other grandchild, although served with process, made no appearance. At the hearing counsel for the trustee said, "But with reference to the view, as trustee, I may say that the bank, as well as myself, is thoroughly in sympathy with the predicament of these ladies." (Respondents herein.) The position of the trustee was, as declared in the probate court, that "if there is a judgment rendered, we will be protected."

The petition filed herein alleges that Gladys Ven Deusen Bright, one of the petitioners, "has been afflicted with a malady and disease which the said petitioner Gladys Van Deusen Bright has been informed and believed, and therefore alleges may be incurable. That in the treatment of said disease and affliction, said petitioner has been required to employ specialists and has required special care and attention. That the said petitioner will continue to require further medical care and attention and possible future hospitalization, the expense of which will be great."

As to petitioner Hazel Van Deusen Lee, it is alleged that she "is unable to provide for herself and must rely as a means of livelihood upon the income derived from the trust created in this estate. That her health and advanced years are such that she is unable to seek employment or any gainful occupation or vocation, and that it is necessary that she receive a sum from the said trust estate, in the sum indicated above, to provide her with the necessities of life and the station to which she has been accustomed."

These allegations, we are persuaded, show the existence of an emergency and peculiar circumstances which were not reasonably within the contemplation of the testatrix when she directed that respondents' benefits from the trust should emanate from the income thereof.

Estate of Markham, 28 Cal.2d 69, 168 P.2d 669, 674, relied upon by appellant, is distinguishable from the case at bar. In the cited case a fully expressed plan and purpose is set forth in the will, and changed conditions arising subsequent to the execution of the testamentary document establishing the trust were not involved. In the Markham case the court, in deciding that resort should not be had to the corpus, had this to say: "In view of the heretofore discussed reference to net income, and the solicitude for the Palmer children as shown by the fact that they were the chief objects of his bounty, and were to receive some benefits even during the life of the other beneficiaries, we do not believe that the use of the term 'remainder' should be construed to mean that the remaindermen were to receive only what was left after the beneficiaries had been paid by resorting to the principal." Other cases cited by appellant also present situations where the court was considering testamentary documents in which were contained well-defined testamentary plans. Here we are confronted with a case wherein an acute and necessitous condition has arisen as to the beneficiaries named to receive the income from the trust. The property of the estate is now worth about $100,000, and while it was producing a yield of about $400 per month during the lifetime of the testatrix, the present income is insufficient to pay such an amount to the named beneficiaries. No plan or purpose being set forth in the testamentary document creating the trust, and extrinsic evidence being admissible to enable the court ot determine the general purpose and intention, such evidence supports the court's finding that during her lifetime the testatrix contemplated "that the provisions set forth in said will for the benefit of petitioners herein would be such that the net income arising from the investments by the trustee in the trust property would be of sufficient yield as to provide her said daughters" (petitioners herein) "with their necessary expenses and needs, and that neither of them would be in want, nor would their necessities of life be unprovided," and the further finding that the testatrix "believed at the time of the creation of the said trust under said last will and testament, that at least the sum of $200 per month would always be available from said trust to be paid to each of the petitioners herein from the net income of said trust and believed and intended that not less than the sum of $200 per month should be paid to each of said petitioners regardless of whether said net income would be sufficient to make said payments and that the said sums would amply provide all the needs and financial demands of said petitioners, and that said sum or sums were necessary to maintain them and each of them."

[9] The court was therefore justified in allowing resort to the corpus rather than permit the purposes of the testatrix to be completely frustrated, and her children, who were the natural objects of her boun-

ty, to suffer want and privation in their declining years, to the end that the grandchildren of the testatrix should eventually receive an augmented principal.

[10, 11] Finally, appellant contends that the court, proceeding under the provisions of section 1120 of the Probate Code, was without jurisdiction to make the challenged order because one of the residuary beneficiaries was a minor. In this contention appellant cannot be upheld. It must be borne in mind that the instant proceeding was not instituted to terminate the trust, but was a petition for instructions to the trustee, in the nature of a request for modification. Section 1120 of the Probate Code expressly provides that "The trustee may also petition such court, from time to time, for instructions as to the administration of the trust," and further provides that due notice shall be given to the beneficiaries as provided in section 1200 of the Probate Code. As to notice, the foregoing provisions of the statute were complied with. It has been held that the language employed in section 1120 of the Probate Code "was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." Estate of Marré, 18 Cal.2d 184, 187, 114 P.2d 586, 589; Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045. Therefore, in this particular proceeding the probate court had jurisdiction of the parties and the subject matter. It was invested with the power to hear and determine, in the mode provided by law, the controversy between the trustee and certain beneficiaries of the trust. We are persuaded that in the case with which we are here concerned, wherein it was necessary in order that justice might be done to respondent beneficiaries, that the interest of one of the residuary beneficiaries who was a minor could be and in fact was represented by the trustee, who vigorously and ably voiced its opposition, both in the trial court and before this court, to the order instructing the trustee to invade the corpus of the trust to make payments of $200 per month to each respondent herein. Mabry v. Scott, 51 Cal.App.2d 245, 257, 124 P.2d 659. The case just cited presents another equally cogent and persuasive argument in support of the validity of the trial court's order herein. At page 256 of 51 Cal.App.2d, at page 665 of 124 P.2d this court said: "* * * Courts may be safely entrusted with the protection of rights of unborn remaindermen. And it is in cases of this sort, in which there is jurisdiction in equity of the controversy, that such rights are protected by the courts themselves. In the present case we can confidently assume that this duty was performed by the trial court." In the case at bar the same assumption may be indulged in as to the rights of a minor beneficiary.

For the foregoing reasons the order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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77 Cal.App.2d 332

DUCAT v. GOLDNER.

Civ. 15358.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1946.

Hearing Denied Feb. 13, 1947.

1. Trial 🔑**228(3)**

In action by pedestrian for injuries sustained on dark rainy night when pedestrian while crossing street was struck by automobile which came around corner, instruction that if motorist turned his vehicle "without giving warning to pedestrian or without pedestrian's knowledge," motorist was negligent toward pedestrian, was not erroneous, on ground that by use of quoted phrase with word "or" court actually gave two instructions in one, or on ground that instruction did not fix pedestrian's position either on crosswalk or elsewhere. Vehicle Code, § 671(b).

2. Automobiles 🔑**160(3)**

Motorist had no right to assume that street onto which he was turning on dark rainy night was clear, but had duty to be vigilant and to anticipate the presence of others on the street, and the fact that he did not know that pedestrian was crossing the street, was no excuse for his failure to give warning. Vehicle Code, § 671(b).

3. Trial ⚷203(1)

Where there was no dispute and parties were agreed that pedestrian when struck by automobile was on crosswalk, instruction concerning pedestrian's position was unnecessary.

4. Automobiles ⚷160(3)

Motorist who turned corner on dark rainy night when there were no street lights and business establishments in the neighborhood were dark, had duty under statute to sound his horn to warn pedestrians who might reasonably be expected to be crossing street on crosswalk. Vehicle Code, § 671(b).

5. Automobiles ⚷216

Whether a pedestrian has been negligent is to be determined from all circumstances in evidence in action against motorist.

6. Automobiles ⚷246(31)

Instruction that a pedestrian crossing at intersection on a crosswalk is not required to look behind him for traffic that might approach him by turning from intersecting street, or to continue looking in that direction as he crosses, was proper.

7. Automobiles ⚷246(58)

Instruction that it was for jury to determine whether pedestrian should have looked behind him for traffic that might approach him by turning from intersecting street, was not applicable, where undisputed evidence was that pedestrian looked before starting to cross street and saw no automobile approaching, since pedestrian was not required to continue looking in that direction.

8. Evidence ⚷354(26)

In personal injury action, original ledger sheet and memorandum bill showing charges made against plaintiff at county hospital were admissible to establish liability incurred by plaintiff for treatment of his injuries.

9. Appeal and error ⚷992

The trial court's determination that foundation laid for documents was sufficient, is binding on appellate court. Code Civ.Proc. § 1953f.

10. Evidence ⚷383(8)

A book of account is prima facie but not conclusive evidence of the transactions recorded therein, and the degree of credit to be given to it as evidence is ordinarily a jury question.

11. Appeal and error ⚷932(1)

In absence of showing that any part of verdict in personal injury action was for special damages, it was presumed that the sum awarded was for pain and suffering.

12. Appeal and error ⚷1170(3)

Where complaint in personal injury action stated that plaintiff would ask leave to amend his pleadings as to exact amount of hospital and medical bills, which was unknown at time of filing of complaint, and defendant was not surprised by proof introduced by plaintiff as to such bills, fact that plaintiff did not ask leave to amend his complaint by inserting the precise amount of his obligations, was harmless. Const. art. 6, § 4½.

13. Automobiles ⚷160(3, 4)

Motorist who turned corner on dark rainy night at place where there were no street lights burning and where lights of business establishment were out, without sounding his horn on making the turn and without yielding his right of way to a pedestrian on crosswalk, was negligent as a matter of law. Vehicle Code, §§ 560(a), 671(b).

14. Automobiles ⚷217(9)

Pedestrian who looked in both directions and back over his shoulder up intersecting street before crossing on crosswalk on dark rainy night, was not guilty of contributory negligence that would preclude recovery for injuries sustained when struck by automobile that came around corner from intersecting street.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Kenneth Ducat against Larry S. Goldner to recover for injuries sustained by plaintiff when struck by defendant's automobile. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Parker, Stanbury & Reese and Harry D. Parker, all of Los Angeles, for appellant.

Katz, Gallagher & Margolis, John T. McTernan and Marburg Yerkes, all of Los Angeles, for respondent.

WILSON, Justice.

From a judgment on a verdict in favor of plaintiff in a personal injury action defendant appeals, asserting as grounds for reversal errors in the instructions to the jury, errors in the admission of evidence, and contributory negligence of plaintiff.

Respondent was walking in a southerly direction on the west side of La Brea Avenue, in the City of Los Angeles, at about 2:00 o'clock in the morning. He started across Eighth Street about the middle of the crosswalk which was marked with white lines, and after taking four or five steps from the north curb line of Eighth Street was struck by appellant's automobile and knocked in a southwesterly direction. At that time there were no street lights and the business establishments in the neighborhood were dark. Rain was falling. Respondent was wearing a long, dark green overcoat and a black rain hat which had a large visor on the back. Before stepping from the curb into Eighth Street respondent looked east and west along Eighth Street and over his left shoulder to the north along La Brea Avenue for the approach of automobiles but saw none. Appellant drove in a southerly direction along La Brea Avenue and made a right turn westerly into Eighth Street. He was driving slowly and after striking respondent his car came to a stop within the lines of the crosswalk, the front end of the car being substantially in line with the west line of the crosswalk. Appellant testified that he did not see respondent until the collision occurred; that his windshield wipers were working and that the lights on his car were burning. Respondent testified that after the accident, when he was being taken home by appellant, the latter worked the wiper on the left side in front of the driver's seat with his hand and said "It's bad out tonight. It's hard to see."

[1] 1. *Alleged errors in the instructions to the jury.* (a) The court instructed the jury as follows: "You are hereby instructed that if you find that by a preponderance of the evidence that defendant turned his vehicle from a southbound direction in La Brea Avenue to the right and into Eighth Street without giving warning to plaintiff or without plaintiff's knowledge, you may find that defendant was negligent toward plaintiff." Appellant contends that by the use of the phrase "without giving warning to plaintiff or without plaintiff's knowledge" the court actually gave two instructions in one in that the jury was instructed that defendant was negligent under either of the two alternatives that are conjoined with the word "or." It also contended that the instruction was defective for the reason that it did not fix the position of respondent either in the crosswalk or elsewhere. We find no error in the instruction. Appellant admitted that he gave no warning as he was turning at a dark corner into a marked crosswalk where a pedestrian might be expected to be. Respondent testified that he looked in all directions from which it might have been anticipated that a vehicle would approach and saw no lights. From the evidence it will be presumed that when respondent looked before stepping from the curb appellant's car was so far distant that the lights were not visible by reason of the atmospheric conditions or that they were obscured by the buildings at the street corner. It is not claimed that respondent had any actual knowledge of the approach of the automobile. Properly construed the instruction means that appellant was negligent if he turned the corner without giving warning unless respondent knew by some other means that the car was approaching.

[2] Appellant had no right to assume that the road was clear but it was his duty to be vigilant and to anticipate the presence of others in the highway. The fact

that he did not know that respondent was in the street is no excuse for his failure to give warning, Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066; Meyers v. Bradford, 54 Cal.App. 157, 159, 201 P. 471, or to keep a proper lookout for pedestrians. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125; Zarzana v. Neve Drug Co., 180 Cal. 32, 37, 179 P. 203, 15 A.L.R. 401; Schomer v. R. L. Craig Co., 137 Cal.App. 620, 624, 31 P.2d 396.

[3] The evidence of both parties, who were the only witnesses to the accident, was that respondent was in the crosswalk at the time he was struck, and since there is no dispute as to where he was walking it was not necessary to instruct the jury concerning his position.

Although, as we have stated, there is no claim either that appellant gave warning or that respondent had knowledge of the approach of the car, any objection that appellant has advanced is excluded from consideration by the fact that both elements were submitted to the jury by the instruction. See Maggart v. Bell, 116 Cal.App. 306, 310, 2 P.2d 516. The jury was not instructed, as in White v. Davis, 103 Cal. App. 531, 544, 284 P. 1086, that the law required that the driver of the car make certain that the pedestrian was aware of his approach.

[4] Section 671(b) of the Vehicle Code requires the driver of a motor vehicle to give an audible warning with his horn "When reasonably necessary to insure safe operation." The darkness of the streets and the condition of the weather required that a reasonably prudent person should sound his horn to insure safe operation of his automobile when turning a corner at a place where a pedestrian might reasonably be expected. The inability of appellant to see respondent did not affect the former's liability.

(b) Another instruction complained of by appellant reads as follows: "You are hereby instructed that a pedestrian crossing an intersection in a crosswalk is not required to look behind him for traffic which might approach him by turning from the intersecting street, or to continue looking in that direction as he crosses." Appellant requested the court to withdraw the instruction and to instruct the jury to disregard it, and in lieu thereof to give the following: "The question as to whether plaintiff should have looked behind him for traffic which might approach him by turning from the intersecting street is a question of fact which must be determined by you from all of the evidence and circumstances in this particular case. It is your duty to determine what an ordinarily prudent person, situated as plaintiff was, would have done under the conditions and circumstances existing at and prior to the time of the happening of the accident in question. If you find from a consideration of the entire evidence in this case that the plaintiff did not exercise for his own safety that degree of care which an ordinarily prudent person would have exercised under the circumstances, then you should find that plaintiff was negligent."

[5-7] It is true that whether or not a pedestrian has been negligent is to be determined from all the facts and circumstances in evidence. Nevertheless, the instruction given by the court is a correct statement of the law. Courviosier v. Burger, 61 Cal.App. 470, 476, 215 P. 93; Kletz v. MacAdam, 94 Cal.App. 770, 773, 271 P. 1101; Devecchio v. Ricketts, 66 Cal.App. 334, 340, 226 P. 11; Erickson v. Grady, 119 Cal.App. 596, 599, 6 P.2d 1002; Cleveland v. Petrusich, 117 Cal.App. 71, 74, 3 P.2d 384. The instruction requested by appellant is not applicable under the evidence. When respondent looked to the north for cars that might turn to the right from La Brea Avenue into Eighth Street and saw none his duty was fully performed and he was not required to continue looking in that direction. Bogan v. White, 137 Cal. App. 150, 152, 30 P.2d 429; Nickell v. Rosenfield, 82 Cal.App. 369, 374, 255 P. 760.

[8-11] 2. *Alleged error in admitting hospital bills in evidence.* Respondent offered evidence of hospital charges against him for which he had become liable for the treatment of the injuries suffered by him as a result of the accident. Pursuant to subpoena a collector for the Bureau of Research and Collections of the County of Los Angeles produced the original records

of charges made against respondent for hospital and medical treatment in the Los Angeles County Hospital. The documents consisted of the original ledger sheet and a memorandum bill showing the charges. Their authenticity and the fact that they had been prepared in the ordinary course of business were established by the witness. They indicated the liability incurred by respondent to the County of Los Angeles. Appellant contends that no foundation was laid in that the necessity for the services rendered and the reasonableness of the amounts charged were not shown. It seems clear from the examination of the witness and from the colloquy of the attorneys during his examination that the documents were not offered for the purpose of proving either the necessity for the services or the reasonableness of the charges. The documents were admissible for the purpose of establishing the liability incurred by respondent for the treatment of his injuries. Egan v. Bishop, 8 Cal.App.2d 119, 122, 47 P.2d 500. The determination by the trial court that the foundation laid was sufficient is binding upon the appellate court. Idem, 8 Cal.App.2d at page 123, 47 P.2d 500; Code Civ.Proc., sec. 1953f. A book of account is prima facie but not conclusive evidence of the transactions recorded therein and the degree of credit to be given to it as evidence is ordinarily a question for the jury. MacDiarmid v. McDevitt, 97 Cal.App. 414, 418, 275 P. 500. Evidence that respondent owed a bill to the County Hospital was competent to show the expense which he had incurred as a result of the accident. Dewhirst v. Leopold, 194 Cal. 424, 433, 229 P. 30; Laubscher v. Blake, 7 Cal.App.2d 376, 383, 46 P.2d 836; Fleming v. Flick, 140 Cal.App. 14, 35, 35 P.2d 210; Townsend v. Keith, 34 Cal.App. 564, 565, 168 P. 402. The reasonableness of the expenses is not disputed. The verdict was for the sum of $4,500 without segregating special from general damages, and no request was made for segregation. If the evidence does not support a verdict for special damages it does support general damages in the sum awarded. It is not claimed that the verdict is excessive in amount. In the absence of any showing to the contrary it is presumed that the sum awarded was for pain and suffering and nothing for special damages. Johnson v. Pearson, 100 Cal.App. 503, 508, 280 P. 394.

[12] There is no merit in appellant's contention that respondent's special damages were not properly pleaded. It is alleged in the complaint that by reason and as a result of the negligence of defendant plaintiff was caused to employ the services of physicians and surgeons and to incur necessary hospital and medical bills, the exact amount of which was unknown at the time the complaint was filed, and that plaintiff would ask leave to amend his pleading so as to set forth the exact amount of the bills therefor. The fact that respondent did not ask leave to amend his complaint by inserting the precise amount of his obligations is of no consequence. Appellant was advised by the pleading that respondent would claim such charges as a part of his damages. He could have ascertained the amounts by demanding a statement of the same or by taking respondent's deposition. Appellant makes no contention that he was surprised by the proof, or that he was without opportunity to defend against the claim, or that the amount was excessive. Having suffered no harm he is without ground for complaint. Const. Art. VI, sec. 4½.

[13] 3. *The sufficiency of the evidence.* Appellant contends that there is no evidence proving negligence on his part. He asserts that by reason of the atmospheric conditions to which we have referred and of the fact that respondent was wearing a dark rain coat and hat, he was practically "blacked out," rendering it impossible for him to be seen. The facts have been fully stated and adequately sustain the verdict and judgment. Appellant failed to sound his horn (sec. 671(b), Vehicle Code) and failed to yield the right of way to a pedestrian in a crosswalk. Sec. 560(a). Violation of the statute was negligence as a matter of law. Nicholas v. Leslie, 7 Cal.App.2d 590, 595, 46 P.2d 761; Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777; Devecchio v. Ricketts, 66 Cal.App. 334, 338, 226 P. 11; Cleveland v. Petrusich, 117 Cal.App. 71, 79, 3 P.2d 384.

[14] 4. *Contributory negligence of respondent.* Appellant's contention that respondent is shown by the evidence to have been guilty of contributory negligence has already been considered in the discussion of the instructions and need not be further elaborated. The facts negate that defense. In addition to the cases previously cited see Schomer v. R. L. Craig Co., 137 Cal. App. 620, 625, 31 P.2d 396; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 341, 208 P. 125.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SCHAUER, J., dissenting.

ALLEN v. ALLEN.[*]

Civ. 15393.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1946.

Rehearing Denied Jan. 16, 1947.

Hearing Granted Feb. 27, 1947.

1. Attorney and client 🔑76(1)
Process 🔑80

A client may discharge his attorney at any time, but during the course of the proceeding service of papers on the client's attorney of record, where service upon the attorney is proper, binds the client until the attorney is discharged or substituted. Code Civ.Proc. §§ 284, 285, 1015.

2. Process 🔑80

In determining whether service of papers on a party's attorney of record to a proceeding binds the party, trial court is concerned, not with whether the party is represented by attorney but whether he has an attorney of record, whether change in attorneys has been made, and whether notice thereof has been given. Code Civ.Proc. §§ 284, 285, 1015.

3. Attorney and client 🔑76(4)

The authority of an attorney ordinarily ends with entry of judgment, except for purpose of enforcing it or having it set aside or reversed.

4. Divorce 🔑78, 302, 308

A divorce judgment, insofar as it relates to custody and maintenance of minor children, is not "final", but as to such matters the litigation is pending and the statute authorizing service upon a nonresident party by serving his attorney of record applies as well after, as before, entry of judgment. Code Civ.Proc. § 1015.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

5. Process 🔑80

An "attorney of record" upon whom service of papers may be made for a nonresident party is the person whom the client has named as his agent upon whom service of papers may be made. Code Civ. Proc. § 1015.

See Words and Phrases, Permanent Edition, for all other definitions of "Attorney of Record".

6. Divorce 🔑78

Under statute providing that service of papers may be made upon a nonresident party by serving his attorney of record, defendant in divorce action involving custody and maintenance of minor child had burden to keep an attorney of record or to make arrangements for notice with the clerk after discharging his attorney and moving out of the state. Code Civ.Proc. § 1015.

7. Army and navy 🔑34
Divorce 🔑202

In wife's divorce action, where custody of minor child was awarded wife, trial court's jurisdiction was a continuing one, so that motion could be made for order increasing allowance for wife's support by making service upon husband's attorney of record notwithstanding husband was in military service and Soldiers' and Sailors' Civil Relief Act prohibiting entry of judgment against a defendant in the military service on default of any appearance until appointment of attorney to represent him was not applicable. Code Civ. Proc. §§ 284, 285, 1015; Soldiers' and

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[*] Subsequent opinion 182 P.2d 551.

Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.,

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Gertrude Ann Allen against Glen V. Allen for divorce. From an order denying defendant's motion to vacate a prior order increasing plaintiff's allowance for support, the defendant appeals.

Affirmed.

Arthur C. Fisher, of Los Angeles, for appellant.

Leo K. Gold, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order, in a divorce action, denying defendant's motion to vacate the court's order increasing plaintiff's allowance for support.

In the divorce action, the judgment had become final. The wife had custody of a minor child. The order which defendant sought to vacate by motion increased the wife's allowance to $37.00 per month; said order further provided, "The order for support of child is to remain at $25.00 per month."

[1-7] It is contended on appeal that the service of notice of the motion on defendant's counsel was not sufficient; it will be assumed that appellant contends, therefore, that the court was, for that reason, without jurisdiction to make the order. Appellant relies on McArthur v. Shaffer, 59 Cal.App.2d 724, 139 P.2d 959, and Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714. Neither of the cited cases is in point. In the within action, service was made on defendant's attorneys of record. In a divorce action, with the interest of a minor child involved, the court's jurisdiction is referred to as a continuing jurisdiction. There is no resemblance between the situations in the two above cited cases and appellant's position in the within action. On the contrary, Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251, 254, is more in point. There the court declared: "A client may of course discharge his attorney at any time (see 3 Cal.Jur. 628, 635), but during the course of a proceeding service of papers on the attorney of record, where service upon the attorney is proper, binds the client until the attorney is discharged or substituted out of the case in the manner provided by law. Grant v. White, 6 Cal. 55, 56; Scarpel v. East Bay Street Rys., 42 Cal.App.2d 32, 115 P.2d 862. The court is concerned in such cases not with whether the client is represented by an attorney, but whether he has an attorney of record, whether any change in attorneys has been made as provided in section 284 of the Code of Civil Procedure, and whether notice thereof has been given as provided in section 285 of that code. The authority of an attorney, however, ordinarily ends with the entry of judgment, except for the purpose of enforcing it or having it set aside or reversed. See 3 Cal.Jur. 668. Nevertheless the judgment of divorce insofar as it relates to the custody and maintenance of minor children is not final. As to those matters the litigation must be regarded as still pending (Rosher v. Superior Court, 9 Cal.2d 556, 569, 71 P.2d 918; Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862; Avila v. Leonardo, 53 Cal.App.2d 602, 608, 128 P.2d 43), and the provisions of section 1015 apply as well after as before the entry of the judgment. Moore v. Superior Court, 203 Cal. 238, 242, 263 P. 1009; see 78 A.L.R. 370, 376. The attorney of record is the person the client has named as his agent upon whom service of papers may be made. The statutes informed defendant that if he had no attorney of record the clerk of the court became his agent for the purpose of service. The burden lay upon the defendant to keep an attorney of record or to make such arrangements for notice with the clerk as he thought advisable. See [State of] Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653. If defendant had noted his discharge of Loucks in the record, plaintiff could have made service on the clerk of the court. The record, however, showed Loucks and Phister as counsel, and the court and

opposing counsel were entitled to rely thereon until it was changed in the manner prescribed by law." The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq., therefore, has no application to the within action. It is noteworthy, moreover, that inasmuch as the court's jurisdiction continues in such circumstances, there is nothing in the law to prevent appellant from making any kind of an appropriate motion to reduce the payments at any time.

For the foregoing reasons, the order is affirmed.

YORK, P. J., concurs.

WHITE, Justice (dissenting).

I dissent:

In the instant case, it is conceded that at the time the order appealed from was made, appellant was in the military service of the United States.

It is true appellant engaged counsel who represented him in the divorce action and filed an answer in his behalf. But the final decree in that action was entered on January 8, 1941, at which time the professional relationship between appellant and his counsel was terminated.

Nothing further occurred until April 21, 1943, when the attorney for respondent served upon the attorney who had represented appellant in the divorce action, a notice of motion re modification of the order made in the divorce decree for the support of respondent wife. This proceeding has no reference whatever to the support of the minor child of the parties.

When service of this notice of motion was made upon appellant's former attorney by mail on April 22, 1943, the attorney was in Washington, D. C. The motion was noticed for hearing on May 19, 1943. When appellant's former attorney returned from Washington on May 10, he wrote to respondent's attorney in part, as follows:

"I do not have the address of the defendant in the action, but do know that he is in the military service of the United States government.

"I will attempt to locate him and ascertain his desire concerning any appearance on his behalf, but, of course, am not authorized to represent him at the present time.

"My services as attorney for Mr. Allen terminated at the time the divorce proceedings were completed, and it will be necessary to so advise the court at the time of the hearing."

On the same day, appellant's attorney wrote to appellant's mother, inquiring of her whether she knew the address of her son. Whether reply was received to this last-mentioned communication does not appear in the record, but on May 11, 1943, respondent's attorney advised appellant's former attorney by letter that, "You might be able to reach Mr. Allen care of the Inshore Patrol Pacific, 15th Naval District, Balboa, Canal Zone. His Personnel Officer is Lt. (J.G.) H. B. Brown, Jr., U. S. N. R."

Immediately, upon receipt of this letter, appellant's former attorney addressed a letter to him at the address given in the communication from respondent's attorney, but, according to the record, such letter was never received by appellant.

When the motion for modification was called for hearing on May 19, 1943, the attorney who had represented appellant appeared in court and advised the court of the foregoing facts. The matter was continued to June 15, 1943, at which time the attorney again appeared and the court was advised that said attorney had been unable to contact appellant. Nevertheless, the court, proceeding with the hearing, made the order from which this appeal was taken.

In the court below, and now on appeal, respondent relies strongly upon the case of Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251. The same case is also cited in the majority opinion as being determinative of the questions presented on this appeal. However, I am persuaded that the Reynolds case is not in point and is easily distinguishable from the facts of the case at bar. In the Reynolds case the appellant was furnished by mail with copies of the papers and admittedly received them. He thereupon engaged the services of counsel who appeared for the sole purpose of objecting to the jurisdiction of the court on the grounds that appellant was a non-resident, had not been personally served with notice within this state, and that the attorney who had represented him previously had not in fact been his counsel for more than three years.

In other words, in the Reynolds case the appellant, who was in military service, received copies of the papers in re modification, engaged the services of counsel to represent him at the hearing, and chose to object to the jurisdiction of the court rather than to oppose the motion on its merits. The case now engaging our attention presents no such analogous situation. In the instant proceeding, appellant had no personal notice, or notice of any kind, of the motion to modify the final divorce decree, nor did he have any opportunity to appear and defend against it.

Upon his return from service, appellant immediately, and within 90 days, took appropriate steps to avail himself of a remedy expressly provided by federal statute, Sec. 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat.L. 1180, Title 50 U.S.C.A.Appendix, § 520.

In part, that section reads as follows:

"Sec. 200. (1) In any action or proceeding commenced in any court, if there shall be a default of an appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgments as in its opinion may be necessary to protect the rights of the defendant under this Act.

"(2) * * *.

"(3) * * *.

"(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

I am unable to understand how it can be held that in a proceeding of this kind a party can be said to have been represented by counsel when he knew nothing of the proceeding and where the attorney served with notice of the same had not represented the interested party since the entry of a final divorce decree more than two years prior to the commencement of the instant proceeding.

In the case of Reynolds v. Reynolds, supra, 21 Cal.2d at page 586, 134 P.2d at page 255, the Supreme Court, after referring to the fact that appellant was apprised of the pending proceeding and engaged counsel to represent him therein, uses this significant language:

"There is no 'default of any appearance' in such a case even though the defendant chooses to make only a special appearance to contest the jurisdiction of the court and therefore limits the authority of his attorneys to that issue. If that course proves ineffective he can hardly contend that he was not represented by counsel. There is nothing in the Soldiers' and Sailors' Civil Relief Act requiring the court to disregard the appointment of attorneys by the defendant and the course of action he decides upon and to appoint another attorney to embark upon another course of action on defendant's behalf."

How different from the factual situation with which we are here concerned. In my opinion, if there ever was a case wherein the court should have, pursuant to the provisions of Subdiv. 4, section 200, of the Soldiers' and Sailors' Civil Relief Act, found that a member of the armed forces of the United States "was prejudiced by reason of his military service in making his defense thereto" and reopen the proceedings so that the serviceman might be "let in to defend", this is such a case.

In the case of Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 282, 153 P.2d 714, 718, our Supreme Court has thus stated the aims, purposes and objectives of the Soldiers' and Sailors' Civil Relief Act:

"Congress, in the lawful exercise of its constitutional power, has thereby declared its purpose to protect those in the military service and to prevent injury to their civil rights during their term of service arising from judicial proceedings conducted against them in their absence. Such act is the supreme law of the land. U.S.Const., art. VI, § 2; Cal.Const., art. I, § 3; Annotation, 130 A.L.R. 774."

Peculiarly significant and cogent to the situation now confronting us is the language contained in the case of McArthur v. Shaffer, 59 Cal.App.2d 724, 728, 139 P.2d 959, 961, wherein the court speaking through Presiding Justice Adams had this to say:

"This statute was enacted in the interests of those in the naval and military service of the United States; and while under its provision courts may, in the exercise of their discretion, refuse to stay proceedings, they are obligated not to do so unless they are of the opinion that the interests of the person in the military or naval service will not be materially affected by a refusal.

"In a recent case the United States Supreme Court said that the judicial discretion conferred on trial courts by the Soldiers' and Sailors' Civil Relief Act is the very heart of the policy of the Act; that 'The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial.' Boone v. Lightner [319 U.S. 561] 63 S.Ct. 1223, 87 L.Ed. 1587."

If the broad and sweeping relief provision of the Soldiers' and Sailors' Civil Relief Act is to be liberally construed to effectuate its purpose (Royster v. Lederle, 6 Cir., 128 F.2d 197), then, in my judgment, the court abused its discretion in not vacating the order of June 15, 1943 and permitting appellant to appear and defend against the motion which materially affected his civil rights during his term of military service.

That portion of the order denying appellant's motion to vacate the aforesaid order of June 15, 1943, should be reversed.

Rehearing denied; WHITE, J., dissenting.

HAMMOND v. McARTHUR.*

Civ. 15580.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1946.

As Corrected Jan. 24, 1947.
Hearing Granted Feb. 27, 1947.

1. Joint tenancy 🔑1

A "joint tenancy" is a joint interest owned by two or more persons in equal shares by a title created by a single will or transfer, or by transfer from a sole owner to himself and others, when expressly declared in will or transfer to be a joint tenancy. Civ.Code, § 683.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

2. Joint tenancy 🔑1, 5

The four unities of interest, title, time, and possession are essential to a joint tenancy and destruction of one of them destroys the joint tenancy, which is thereupon succeeded by a tenancy in common. Civ.Code, § 683.

3. Joint tenancy 🔑3, 4

A joint tenancy may be broken by a conveyance by one joint tenant to a third party, and reconveyance by such grantee to joint tenant does not re-establish the joint tenancy. Civ.Code, § 683.

4. Joint tenancy 🔑4

A joint tenancy may be severed by conveyance from one joint tenant to the other. Civ.Code, § 683.

5. Joint tenancy 🔑8

Joint tenants have an equal right to possession of the property and, if one is out of possession, he can recover no more than right to be let into joint possession with joint tenant.

6. Joint tenancy 🔑8
Life estates 🔑7, 15(1)

Each joint tenant is entitled to an equal share of income from the property, while a life tenant is entitled to exclusive occupancy of the property and to receive the entire net income. Civ.Code, §§ 683, 818.

7. Descent and distribution 🔑8
Joint tenancy 🔑4
Tenancy in common 🔑3

Conveyance of life estate in joint tenancy property by one joint tenant to the other destroyed the joint tenancy and created a tenancy in common as to the fee-simple title and, upon termination of life estate at death of life tenant, her undivided one-half interest as tenant in common passed to her heirs while the other one-half interest vested in cotenant as remainderman but not as a joint tenant. Civ.Code, § 683.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold L. Hammond, as administrator of the estate of Nettie Elizabeth Rowley, deceased, against Alberta June McArthur to quiet title to an undivided one-half interest in realty, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Judgment reversed with directions to enter judgment for plaintiff.

Vincent Scott, of Los Angeles, for appellant.

Donald J. Dunne, of Los Angeles, for respondent.

WILSON, Justice.

Respondent correctly states the only question to be determined by this appeal as follows: "Does a conveyance by one joint tenant to the other joint tenant of a life estate in the joint tenancy property result in the severance of the joint tenancy so that thereafter said parties become tenants in common as to the fee simple title, each owning an undivided one-half interest in said property?"

Decedent and respondent owned real property as joint tenants. In October, 1941, respondent conveyed to decedent "a full life estate together with all rents, issues and profits in and to" the property. Upon the death of decedent an administrator of her estate was appointed and this action was brought to quiet title to an undivided one-half interest in the property on the theory that the conveyance of the life estate destroyed the joint tenancy and that from the date of the deed conveying the life estate the parties were tenants in common. Respondent contends that notwithstanding the conveyance the joint tenancy continued until the death of decedent, whereupon it terminated and respondent became the owner of the entire property. Judgment was rendered in favor of defendant and plaintiff appeals.

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* Subsequent opinion 183 P.2d 1.

[1-4] The requisites for the creation, maintenance and continuation of a joint tenancy estate have been well established. A joint tenancy is a joint interest owned by two or more persons in equal shares by a title created by a single will or transfer or by transfer from a sole owner to himself and others, when expressly declared in the will or transfer to be a joint tenancy. Civil Code, sec. 683. Four unities are are necessary to constitute a joint tenancy: unity of interest, unity of title, unity of time, and unity of possession. McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810; Siberell v. Siberell, 214 Cal. 767, 771, 7 P.2d 1003. When one of these unities is destroyed the joint tenancy is destroyed and a tenancy in common succeeds it. Reiss v. Reiss, 45 Cal.App.2d 740, 747, 114 P.2d 718. A joint tenancy may be broken by a conveyance from one joint tenant to a third party. Tilden v. Tilden, 81 Cal.App. 535, 542, 254 P. 310; Green v. Skinner, 185 Cal. 435, 438, 195 P. 60; Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513; Young v. Hessler, 72 Cal.App.2d 67, 69, 164 P.2d 65. A deed by the grantee of the joint tenant reconveying title to the latter does not reestablish the joint tenancy. Szymczak v. Szymczak, 306 Ill. 541, 138 N.E. 218, 220. A joint tenancy may be severed by a conveyance from one joint tenant to the other. Hiltbrand v. Hiltbrand, 13 Cal.App.2d 330, 333, 56 P.2d 1292; Overton v. Lacy, 22 Ky. 13, 17, 6 T. B. Mon. 13, 17, 17 Am.Dec. 111.

[5, 6] The rights of a joint tenant are different from those of a life tenant. One of the attributes of a joint tenancy is that the joint tenants have an equal right to possession of the property (Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 454, 54 P.2d 73), and if one be out of possession he can recover no more than the right to be let into joint possession with his joint tenant. Noble v. Manatt, 42 Cal.App. 496, 497, 183 P. 823. Another attribute is that each joint tenant is entitled to an equal share of the income. On the other hand, a life tenant is entitled to exclusive occupancy of the property and is entitled to receive the entire net income. Civil Code, sec. 818; Estate of Gartenlaub, 185 Cal. 375, 383, 197 P. 90, 24 L.R.A. 1; Estate of Duffill, 180 Cal. 748, 756, 183 P. 337.

[7] Previously to the execution of the deed by respondent conveying a life estate in her interest in the property to decedent all the necessary unities existed and the parties were entitled to joint possession of the property and to an equal division of the income. The conveyance of the life estate enlarged the rights of decedent to the extent that during her life she became entitled to exclusive possession and to all the income. Respondent's rights in the property were correspondingly abridged. All the unities were annulled. During the lifetime of decedent she became possessed of a greater interest in the property than that of respondent; the title was no longer the same as when the joint tenancy was created; the unity of time was destroyed by the fact that respondent was divested of title to her interest except her right as remainderman; decedent was entitled to possession of the property and to the income therefrom to the exclusion of respondent. The severance of the unities destroyed the joint tenancy and created a tenancy in common. At the death of decedent her life estate in the property terminated, and respondent's title to her original one-half interest became vested in her as remainderman, not as a joint tenant.

Since the parties were tenants in common, decedent's interest passed to her heirs and the administrator of the estate was entitled to a decree quieting title to an undivided one-half interest in the property.

Judgment reversed with directions to enter a judgment in favor of plaintiff as prayed in his complaint.

MOORE, P. J., concurs.

77 Cal.App.2d 585

CARMAN v. ATHEARN.

Civ. 13284.

District Court of Appeal, First District,
Division 1, California.
Jan. 9, 1947.
Hearing Denied March 10, 1947.

1. Appeal and error ⇨994(3)

Credibility of witnesses whose testimony is conflicting is for trial court, when sitting without a jury.

2. Appeal and error ⇨994(3)

Where trial court resolved conflicting testimony in favor of plaintiff, reviewing court was required to accept plaintiff's story as true, to indulge in all reasonable inferences deducible therefrom and to assume that trial court disbelieved defendant and disregarded her testimony where it conflicted with or related to matters not touched upon by plaintiff's testimony.

3. Divorce ⇨255

Where divorce complaint alleged and judgment determined that there was no community property, divorce judgment was res judicata of issue that particular property was not community property.

4. Divorce ⇨255

Where plaintiff claimed that he owned an undivided one-half interest in land as a tenant in common with defendant, determination in prior divorce case that plaintiff and defendant had no community property was not res judicata of the issue.

5. Divorce ⇨253

Where issue was whether parties to divorce action had agreed to hold land in common and whether a separation agreement had mistakenly failed to so provide, evidence that property was originally acquired with community funds was relevant.

6. Appeal and error ⇨1041(4)

Where there was a complete hearing on nature of oral agreement for division of property and as to circumstances under which subsequent written agreement was executed, and, after allowance of amendments to plaintiff's pleadings to conform to proof with respect to such agreements, defendant did not seek to set submission aside for purpose of introducing additional evidence, allowance of amendments was not prejudicial to defendant. Code Civ. Proc. §§ 469, 470.

7. Pleading ⇨236(5)

Allowance of amendments to pleadings to conform to proof is discretionary, even where motion to amend is not made until after submission of cause. Code Civ. Proc. §§ 469, 470.

8. Pleading ⇨237(1)

The greatest liberality is to be encouraged in allowance of amendments to conform to proof in order to see that justice is done. Code Civ.Proc. §§ 469, 470.

9. Frauds, statute of ⇨142

Reformation of written instrument to make it conform to true intent of parties as previously expressed in an oral agreement but which had, by mutual mistake or alleged fraud of defendant, been incorrectly expressed is not violative of statute of frauds as substituting of the oral agreement for written agreement.

10. Frauds, statute of ⇨139(1)

The California statute of frauds does not embrace executed agreements between husband and wife affecting their interests in property.

11. Appeal and error ⇨1009(1)

Determination of trial judge as a fact as to reasonableness of plaintiff's failure to understand written agreement sought to be reformed and as to reasonableness of his reliance on defendant's representations was conclusive on appeal.

12. Limitation of actions ⇨37(1)
Reformation of instruments ⇨32

Where plaintiff's failure to understand written agreement relative to his interest in certain land was reasonable and plaintiff reasonably relied on defendant's representations that written agreement conformed to a prior oral agreement, plaintiff was not guilty of laches or barred by limitations from seeking reformation of writing shortly after discovery of its meaning although suit was not brought until more than five years after agreement was made. Code Civ.Proc. § 338, subd. 4.

13. Reformation of Instruments 🔑1, 6

The main purpose of reformation is to make a contract which, through mistake or fraud, fails to express the true intent of the parties, express such intent and the ambiguity of the contract is immaterial. Civ.Code § 3399.

14. Deeds 🔑108

Whether a present conveyance is contemplated is a matter of intent disclosed by words of instrument of conveyance and no precise words are necessary to constitute the present conveyance.

15. Husband and wife 🔑279(1)

Property settlement agreement between divorced parties as reformed, disclosing intention to pass a present title to an undivided one-half interest in property to plaintiff, was effective for that purpose.

16. Fraudulent conveyances 🔑174(3)

Where a debtor has conveyed his property to another for purpose of defrauding a creditor, he cannot thereafter compel a reconveyance.

17. Equity 🔑65(2)
Fraudulent conveyances 🔑174(3)

Where a debtor, after conveying property to defraud his creditors, subsequently purges the fraudulent conduct by paying creditors in full, the clean hands doctrine has no application and debtor is entitled to a reconveyance.

18. Fraudulent conveyances 🔑174(3)

Where husband conveyed property to wife to prevent his first wife from seizing it under alimony judgments, but subsequently, paid in full the claims of first wife and all his other creditors, he was entitled to a reconveyance from second wife, after divorce and separation, of an undivided one-half interest in land.

19. Equity 🔑65(3)

The misconduct which brings the clean hands doctrine into operation to prevent equity from compelling a reconveyance must relate directly to the transaction concerning which complaint is made.

20. Equity 🔑65(3)

Under the "clean hands" doctrine, a party may have relief in connection with a transaction itself untainted although his original title may have been tainted by improper conduct, since relief will not be denied because plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect problem before court.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

21. Equity 🔑65(3)

Where husband made an alleged fraudulent conveyance to wife, and, after divorce, entered into a contract by which divorced wife agreed to convey to husband for a valid consideration a one-half interest in the property, "clean hands" doctrine did not apply and the second contract would be enforced.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Richard F. Carman against Lucille F. Athearn for partition of real property and for reformation of provisions of a separation agreement with respect to such property. From an interlocutory judgment of partition in favor of plaintiff, defendant appeals.

Affirmed.

Athearn, Chandler & Farmer, Hoffman & Angell, and Leigh Athearn, all of San Francisco, for appellant.

Francis N. Foley, of San Mateo, for respondent.

PETERS, Presiding Justice.

Plaintiff, alleging that he and defendant owned certain property in San Mateo County in equal parts as tenants in common, brought this action for partition. Defendant, by answer, set up a complete title in herself. She also alleged that on August 8, 1940, plaintiff and defendant were husband and wife, and that on that date they executed a written agreement whereby plaintiff waived all rights he might have had in the property, except that it was provided that if the property should be sold plaintiff was to receive one-half of the net proceeds after all encumbrances existing on August 8, 1940, had been paid. She also alleged her procurement, by default, of a decree of divorce from defendant, the interlocutory being secured February 17, 1941, and the final decree February 19, 1942, by the terms of which decrees it was determined that there was then no community property of the parties.

The cause proceeded to trial on these pleadings. A short time after submission plaintiff was allowed, over objections of defendant, to file two amendments to conform to the proof. In the first amendment plaintiff alleged the marriage of himself and defendant on June 16, 1932; that they lived together as husband and wife until June 8, 1940; that the property involved was acquired as their community property; that on June 8, 1940, the parties agreed to separate and orally agreed to divide their community property equally; that it was orally agreed that each would have an undivided one-half interest in the real property here involved; that such property would be sold in a reasonable time and the net proceeds divided equally between them; that this oral agreement was reduced to writing and signed by the parties on August 8, 1940; that in reference to this property the written agreement in paragraph 8 provided: "It is mutually agreed between the parties hereto that, by this agreement no disposition is made of that certain real property of eleven acres (11) in the town of Woodside, San Mateo County, California standing of record in the name of the second party, except that when such property is sold, half (½) of the net proceeds of such sale over and above the encumbrances against the property at the time of the execution of this instrument shall be paid over and become the property of the first party, and that the one-half which becomes the property of the second party is her separate property free and clear of any claim by the first party."

It is then alleged that the above portion of the written agreement did not express the true agreement of the parties that each was to have a one-half interest in the property; that plaintiff was mistaken as to the effect of the above-quoted provision, he believing that it conformed to their oral agreement; that the mistake was mutual, or, if only on his part, that defendant was aware thereof; that he would not have entered into the agreement had he been aware that the contract did not provide for an undivided one-half interest in each of the contracting parties; that the August 8, 1940, agreement should be reformed to provide, in accordance with the true oral agreement of the parties that: "It is mutually agreed between the parties hereto, that certain real property of eleven (11) acres in the town of Woodside, San Mateo County, California, standing of record in the name of the second party shall be divided equally between the parties hereto and each shall have an undivided one-half (½) interest therein and that said property shall be sold within a reasonable time and the net proceeds divided equally between the parties hereto."

The second amendment to conform to proof was filed a short time later. Plaintiff here alleged that the oral agreement was fully consummated by the parties; that defendant prepared the August 8, 1940, written agreement with the aid of her attorney, representing to plaintiff that it had been so prepared and that it corresponded with their oral agreement; that subsequent to the execution of the agreement plaintiff submitted to defendant several offers made to him to purchase the property; that on December 15, 1944, defendant told him that she would not sell; that plaintiff then, for the first time, procured legal advice; that defendant first claimed the property as her separate property in her answer and deposition in the present action; "that at no time prior to said Answer or deposition did plaintiff suspect or have reason to suspect that said defendant did not intend to live up to her agreement or that she claimed or would claim the said written agreement did not correspond to or embody said oral agreement."

Defendant demurred to these amendments and such demurrer was overruled. She thereupon answered, alleging as separate defenses an alleged waiver by plaintiff under the written agreement; that the decree of divorce adjudging that there was no community property was res judicata of that issue; that the cause of action for reformation was barred by laches and by the three-year statute for relief from fraud or mistake—§ 338(4), Code of Civil Procedure; and that plaintiff was not entitled to any relief because he did not come into court with "clean hands."

The court found generally in favor of plaintiff, ordered that the agreement of August 8, 1940, be reformed as prayed for by plaintiff and granted plaintiff's prayer for a partition, subject to the liens of designated taxes and deeds of trust.

From the interlocutory judgment of partition defendant appeals, her main contentions being that the divorce judgment is res judicata on the "no community property" issue; that plaintiff was improperly permitted to prove an equitable interest in himself after alleging a legal title; that the written separation agreement was conclusive and should not have been reformed; that it was error to have permitted the complaint to be amended to conform to the proof after submission of the cause; that plaintiff was barred from any equitable relief under the "clean hands" doctrine because the evidence shows that the property involved was placed by plaintiff in the name of defendant to defraud his creditors.

Plaintiff testified that he and defendant were married in June of 1932 in Indiana; that at the time of the marriage he was training race horses, while defendant was a buyer for a ladies' apparel shop in Delaware; that at the time of the marriage he was earning about $12,000 a year and had $4,000 of his own money in the bank; that at that time defendant had no property; that in November of 1932 his then employer sold his racing stable and he, the plaintiff, purchased several race horses from him; that he, thereafter, worked for several employers and raced his own horses; that in the fall of 1934 he came to California and raced his horses here; that in 1935 he and his wife purchased a home in Burlingame Hills; that the purchase price was entirely paid for from his earnings; that his wife engaged in no gainful occupation during their married life until two months before their separation, which occurred in 1940; that in 1938 he and his wife exchanged the Burlingame Hills property for a piece of property in Woodside, which is the property involved in this proceeding; that all payments on the Woodside property were made from his earnings; that titles to both the Burlingame Hills property and to the Woodside property were taken in the name of his wife; that the titles to the various horses he owned were taken and raced either under the name of a friend or in the name of his wife; that at the time of trial (July of 1945) he had been a real estate salesman for about four years.

On both direct and cross-examination plaintiff frankly and fairly admitted that he had been married and divorced prior to his marriage to defendant; that he was legally responsible to his previous wife and to their children for their support; that he had agreed to pay for such support an amount based on his earning power when he was earning $12,000 a year; that after his marriage to defendant his earning power decreased and he was unable to keep up the payments; that his former wife sued him and secured several judgments against him; that he put the titles to the Burlingame Hills and Woodside properties, and to the horses, in the name of defendant so that his first wife could not "reach" such properties; that he did this because if these properties were taken from him he "wouldn't have any capital to make any money with."

Plaintiff also testified that he and defendant separated in June, 1940; that at that time they had the Woodside property, two automobiles, the furniture in the Woodside house and a one-half interest in a horse; that all of this property, with the exception of a couple of pieces of furniture that belonged to defendant, had been purchased from his earnings after marriage to defendant; that before they separated the two parties "agreed to divide everything" fifty-fifty; that pursuant to this agreement each took one of the automobiles and defendant took all of the furniture while he kept the one-half interest in the horse. They orally agreed that the Woodside property should be divided "fifty-fifty." During these discussions and prior thereto the defendant at no time claimed the Woodside property as her separate property. After the terms of the separation agreement had been agreed upon the parties separated. Thereafter, and apparently in anticipation of a proposed divorce action by defendant, the terms of the oral contract were reduced to the writing dated August 8, 1940. In relation to this agreement plaintiff testified that defendant "drew up" the contract and importuned him to sign it; that she told him that she had been assisted in drafting the document by her attorney; that plaintiff signed the document after insisting on a few changes; that he signed it in the belief and understanding that the agreement provided that the Woodside property was to be divided equally between them in accordance with their prior oral agreement. It is paragraph 8 of this writing that is involved in this proceeding. The paragraph has already been quoted and it provides only for a fifty-fifty division of the proceeds from the sale of the property and grants plaintiff no interest in the property itself.

The plaintiff further testified that the parties agreed that the property would be sold "when we could get a good price for it"; that subsequently he approached defendant with several offers he had received for the property but she refused to join in a sale, but at no time did she claim the property as her separate property; that when he presented the last offer defendant told him that she never intended to sell, that she would not sell and that there was no way he could make her sell; that she claimed the agreement did not provide for a sale date but did not claim the property as her own; that he thereafter instituted the partition suit; that the first time he ever knew that she claimed the property as her own was when his counsel showed him defendant's "deposition", by which he was probably referring to defendant's answer, in which she alleged sole title in herself.

Defendant contradicted most of this evidence of plaintiff. She testified that respondent read the August 8, 1940, agreement before he signed it and told the notary that he understood it; that the original horses brought to California were a gift to her from her cousin; that the Burlingame Hills and Woodside properties were acquired with her earnings from these original horses; that she did not tell plaintiff that she had consulted an attorney in drafting the August 8, 1940, agreement; that she drew up the original agreement but took the terminology from a form book; that in order to settle their affairs she was willing to "allow" plaintiff a one-half interest in the proceeds from the sale of the Woodside property; that in that agreement she did not describe the Woodside property as her separate property because there was "no point in writing it" and "it never occurred to me"; that she did tell plaintiff he had no interest in the Woodside property; that plaintiff suggested the disputed clause of the agreement.

[1, 2] The plaintiff and defendant were the only two witnesses. As the above brief summary of their testimony indicates, in most vital respects their stories were diametrically opposed. It was the function of the trial court to pass on the credibility of these witnesses. The trial judge saw these two parties, he observed their demeanor on the witness stand, and he has determined the facts in accordance with the testimony of the plaintiff. This court cannot disturb these findings based on such a record. We must accept as true the story told by plaintiff, and must indulge in all reasonable inferences deducible from that evidence. We must assume that the trial court disbelieved defendant and we must disregard her testimony, not only where her story directly conflicts with that of plaintiff but even as to facts testified to by her and not contradicted by plaintiff. On this appeal, defendant, while conceding that these rules apply, nevertheless argues several points which are fundamentally based on the testimony of plaintiff. These points will not be further considered.

[3] The judgment roll in the divorce action of the parties was admitted into evidence. In the complaint it is alleged that there was no community property of the parties, and plaintiff concedes that in that action it was determined that there was no such community property. Based on this premise, defendant now argues that this determination in the divorce action is res judicata of the issue that the Woodside property was not community property at the date of the divorce decree. This contention is undoubtedly correct. Brown v. Brown, 170 Cal. 1, 147 P. 1168; Allen v. McCrary, 220 Cal. 508, 31 P.2d 388; Call-

non v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988. Based on these cases defendant objected in the court below to the introduction of any testimony that the Woodside property had been acquired with community funds, claiming not only that plaintiff was thus seeking to show that the Woodside property was community, but also that he was attempting to prove an equitable title when he had alleged a legal one, which cannot lawfully be done. Spader v. McNell, 130 Cal. 500, 62 P. 828. These objections were overruled below and the evidence admitted.

Defendant contends that these rulings were erroneous.

[4, 5] The trial court properly admitted the evidence. The contentions of defendant disregard the issues involved below and the purpose of such testimony. Plaintiff at no time has claimed that the Woodside property is now community property. He claims and the trial court found that he owns an undivided one-half interest as a tenant in common. The determination in the divorce action that there was no community property was not a determination that the parties did not then hold property in common. The issues before the trial court were whether the parties had agreed to hold the Woodside property in common and whether the agreement of August 8, 1940, had mistakenly failed to so provide. The evidence that the property was originally acquired with community funds was clearly relevant on these issues. The basis of acquisition has a direct and definite bearing upon the likelihood of the existence of the claimed agreement. If the property had in fact been originally property of the community, even though taken in defendant's name to defeat plaintiff's creditors, such fact lends some support to plaintiff's contention that upon separation the parties agreed to equally divide the property. Quite clearly, if such were the fact, the parties would be far more likely to have agreed to divide the property equally than they would have been had the property been the sole and separate property of the defendant. The evidence was not admitted to prove that the property was now community property, but only for what light it might throw on the basic question as to whether the parties had in fact agreed to divide it equally.

[6-8] Defendant strenuously objects to the ruling of the trial court made after submission of the cause permitting the filing of the two amendments to conform to the proof by which reformation was sought. Defendant urges that the allowance of the amendments "materially prejudiced" her defense. The record does not support her contention. It demonstrates that there was a full and complete hearing on the nature of the oral agreement and the circumstances under which the written agreement was executed. After the allowance of the amendments defendant did not seek to set the submission aside for the purpose of introducing additional evidence, nor is it seriously suggested that any other evidence on the basic issues was available. The allowance of amendments to conform to the proof rests in the sound discretion of the trial court. This is so even where, as here, the motion is not made until after submission of the cause. Stoops v. Pistachio, 70 Cal.App. 772, 234 P. 423; Lee v. Murphy, 119 Cal. 364, 51 P. 549, 955; §§ 469 and 470, Code of Civil Procedure; see cases collected 21 Cal.Jur. p. 211, § 144. The greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done. See cases collected 21 Cal.Jur. p. 209, § 143. The record here shows that defendant could not have been legally prejudiced by the allowance of the amendments. She was given a full, fair and ample opportunity to introduce all relevant evidence on the issues. Her counsel cross-examined plaintiff at length on the issues and she testified at length as to her version of the facts involved. As found by the trial court on substantial evidence the case is simply one where the parties orally agreed that certain property should be held in common and then one of the parties prepared, with legal advice, a written document representing that it expressed the oral agreement. The other signed the agreement in the honest and reasonable belief that it so provided and filed his action in such belief. It was not until after the answer was filed that he discovered his

mistake. He should have then moved to amend, but his failure to do so cannot be held to be fatal where the issues involved were fully and completely gone into on the trial. The permission to file the amendments was clearly in the interests of justice and within the discretionary powers of the court.

[9, 10] The defendant also contends that on the merits it was error to grant reformation in this case. She argues that for the court to substitute for the written agreement the oral agreement intended to be expressed by paragraph 8 does violence to the statute of frauds requiring agreements relating to the transfer of real property to be in writing. This contention is clearly without merit for the obvious reason that by the reformation the court was not "substituting" the oral agreement for the written, but merely reforming the written by making it conform to what the court was convinced, and the evidence shows, had been the true intent of the parties, but which had by mutual mistake or the fraud of defendant been incorrectly expressed. Moreover, such executed agreements between husband and wife affecting their interests in property need not be in writing in this state. See cases collected 3 Cal. Jur.Supp. p. 640, § 126.

[11, 12] It is next urged that the cause of action for reformation was barred either by the statute of limitation or by laches in that plaintiff did not seek reformation until five years after the written agreement was entered into. The point is without merit. The amendment to the complaint fully alleges the time and circumstances under which plaintiff discovered that the written agreement erroneously expressed the intent of the parties. It was a question of fact for the trial court to determine whether plaintiff reasonably relied on the representation of the defendant that the writing conformed to the oral agreement. In this connection the court was entitled to consider the evidence that defendant represented the agreement had been prepared with legal advice and that she did not claim the property was hers. It was for the trial court to determine under the facts whether plaintiff's failure to understand the document was reasonable. See cases collected 22 Cal. Jur. p. 726, § 14. Under the circumstances the determination of the trial court on these issues is conclusive. Krone v. Insurance Co. of North America, 218 Cal. 556, 24 P.2d 459; Hart v. Walton, 9 Cal.App. 502, 99 P. 719; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958.

[13] It is next urged that it was error to reform paragraph 8 because such paragraph is not ambiguous, and, so it is contended, an agreement clear on its face cannot be reformed. This is merely another way of urging that plaintiff should have known what he was signing when he signed the document. Such a contention loses sight of the main purpose of reformation which is to make a contract which, through mistake or fraud, fails to express the true intent of the parties, express such intent. Ambiguity has nothing to do with the question as to the right to grant reformation, although it may have on the issue of laches, already discussed. See cases collected 45 Am.Jur. p. 584, § 2. Certainly § 3399 of the Civil Code places no such limitation on the power. That section provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." See generally cases collected 22 Cal.Jur. p. 711, § 3, et seq.

In the only case that we have found where the court considered the point worthy of discussion it was held that: "The plaintiff's contention that the right to reform a written instrument exists only where there is something doubtful or ambiguous upon the face of the writing has, we think, no support in authority." Hausbrandt v. Hofler, 117 Iowa 103, 90 N.W. 494, 495, 94 Am.St.Rep. 289.

[14, 15] It is next urged that even as reformed paragraph 8 of the written instrument does not give plaintiff any interest

in the Woodside property, but only an interest in the proceeds. As reformed the paragraph provides that it is mutually agreed that the Woodside property standing in the name of defendant "shall be divided equally between the parties hereto and each shall have an undivided one-half (½) interest therein." It is then provided that upon the sale of the property the net proceeds shall be divided equally. Defendant places her main reliance on this last clause, contending that it demonstrates that no present conveyance was intended. This is a matter of intent as disclosed by the words of the instrument. No precise words are necessary to constitute a present conveyance. See cases collected 9 Cal.Jur. p. 107, § 13; 4 Tiffany on Real Property (3d Ed.), p. 44, § 971; 1 Devlin on Real Estate (Deeds) (3d Ed.), p. 306, § 211; 16 Am.Jur. p. 469, § 49. Thus the true question is whether the words heretofore quoted are sufficient to show an intention to pass a present title to an undivided one-half interest in the property. There can be no doubt, in view of the plaintiff's evidence, that the parties intended to recognize the present existence of a one-half interest in the plaintiff. While the interpretation of a document purporting to transfer a present interest in real property may be a question of law, particularly where the rights of third persons are involved, it must be remembered that the present dispute is between the two parties to the contract of August 8, 1940, as reformed, and that it is their intent as disclosed by that document as reformed that the trial court and this court are attempting to ascertain. While the unfortunate use of the phrases "shall be divided" and "each shall have an undivided one-half (½) interest therein" could be interpreted as operating only at some time in the future, such interpretation is not compelled. The purpose of the document demonstrates that this was not and could not have been the intent with which those words were used. The case is not substantially different from Olson v. Cornwell, 134 Cal.App. 419, at page 427, 25 P.2d 879, 882, where the court stated: "The contract recited that a settlement of all disputes between the parties had been made, and contained the provision that plaintiffs 'shall have and from now on are entitled to one-sixth (⅙) part and interest each' in the property. It seems clear from the language of the parties that it was the intention to make a present transfer to plaintiffs of an undivided interest in the property; and where the intent is expressed it is sufficient, whatever may be the inaccuracy of expression or the inaptness of the words used, and the courts will give the instrument that effect. [Citing authorities.]"

While the language used in the above contract is somewhat clearer than that here employed the same principle is applicable. The cases which hold that language somewhat similar to that here involved did not constitute a present conveyance all contained language, not here present, indicating that no present interest was intended to be conveyed or involved the rights of third persons. See McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 79 P. 447, 1 L.R.A., N.S., 315, 104 Am.St.Rep. 84; Scott v. Woodworth, 34 Cal.App. 400, 167 P. 543; Brewton v. Watson, 67 Ala. 121.

[16] The last major point urged is that it was improper to grant partition because the evidence shows the original deeds to the Burlingame Hills and Woodside properties were taken in the name of defendant in order to prevent plaintiff's first wife and other creditors from collecting their claims against him. Of course, where a debtor has conveyed his property to another for the purpose of defrauding his creditors, he cannot thereafter compel a reconveyance. In such a situation the doors of the equity court are closed to him. The inequity of the original transaction prevents the granting of equitable relief. It is this principle that defendant seeks to invoke in this partition action.

[17, 18] This so-called "clean hands" doctrine is not here applicable for several reasons. In the first place, the evidence here shows that plaintiff has purged himself of his prior fraudulent conduct. His uncontradicted evidence was to the effect that the claims of his first wife have been fully paid. While there was evidence by defendant that plaintiff owed other credi-

tors, plaintiff testified the claims of these creditors had also been settled. The trial court chose to believe plaintiff and to disbelieve defendant. No creditor testified that plaintiff owed him one cent. Under such circumstances the law is well settled that the "clean hands" doctrine has no application. Stockwell v. McAlvay, 10 Cal.2d 368, 74 P.2d 504; Annotation 4 A.L.R. 44, particularly at p. 59; cases collected 30 C.J.S., Equity, § 98, p. 487; 2 Pomeroy's Equity Jurisprudence (5th Ed.), p. 94, § 399.

[19, 20] In the second place, the transaction here involved is the reconveyance by the wife to her former husband, not the fraudulent transfer to the defendant. The misconduct which brings the "clean hands" doctrine into operation must relate directly to the transaction concerning which complaint is made. The misconduct must infect the cause of action before the court. Relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court. A party may have relief in connection with a transaction itself untainted although his original title may have been tainted by improper conduct. These principles are well settled. See Germo Mfg. Co. of Missouri v. McClellan, 107 Cal.App. 532, 290 P. 534; Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750; Western Union Tel. Co. v. Commercial Pac. Cable Co., 177 Cal. 577, 171 P. 317; 2 Pomeroy's Equity Jurisprudence (5th Ed.), p. 94, § 399; cases collected 30 C.J.S., Equity, § 98, subsec. c, p. 491; 4 A.L.R. 44 at p. 65. In the present case the issues before the court involved the August 8, 1940, transaction. As to that transaction the conduct of plaintiff was in no way tainted with any inequitable or improper conduct.

[21] Here the parties who were the participants to the original fraudulent grant have entered into a separate, distinct and different contract relating to that property. By that contract the original fraudulent grantee has conveyed to the original fraudulent grantor, for a valid and legal consideration, a one-half interest in the property. In such a situation the second contract will be enforced. (2 Pomeroy's Equity Jurisprudence (5th Ed.), p. 108, § 401(a); Annotation 89 A.L.R. 1166 at p. 1168; see Foster v. Winchester, 92 Ala. 497, 9 So. 83, for a good discussion of the rule.)

None of the other points raised require discussion.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, J., pro tem, concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

EASTERN-COLUMBIA, Inc., v. WALDMAN.*

Civ. 15625.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1946.

Hearing Granted Feb. 27, 1947.

1. Trade-marks and trade-names and unfair competition 🔑71

Generally, first appropriator of word with secondary meaning cannot prevent another person from using such word in conjunction with other words, but can enjoin another person from using such word in descriptive way so as to pass off his goods as goods of first appropriator.

2. Trade-marks and trade-names and unfair competition 🔑97

In action by plaintiff conducting furniture business under name "Eastern-Columbia" to restrain defendant conducting similar business from using name "Western Columbia," whether plaintiff would be granted absolute injunction, or injunction denying use of "Western Columbia" except where emphasis is made that words do not refer to plaintiff, was discretionary.

3. Trade-marks and trade-names and unfair competition 🔑97

A defendant conducting furniture business under name "Western Columbia" for express purpose, as found by trial court,

* Subsequent opinion 181 P.2d 865.

of defrauding plaintiff conducting similar business under name "Eastern-Columbia", would be enjoined from using words "Western Columbia" alone as name or designation of defendant's business, and from using words jointly with other words unless it should be clearly indicated to patron or consumer that defendant was not plaintiff.

WILSON, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Unfair competition action by Eastern-Columbia, Inc., against Jules Waldman, individually, and doing business under the name of Western-Columbia. From the judgment, the plaintiff appeals.

Affirmed, as modified.

Benjamin, Lieberman & Elmore, of Los Angeles, for appellant.

Hugh B. Rotchford, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment in its favor after trial before the court without a jury in an unfair competition action in which plaintiff sought to restrain defendant from the use of the trade name, Western-Columbia.

So far as material here these are the essential facts:

Since August 17, 1939, plaintiff has been doing business in Los Angeles and other cities on the Pacific Coast under the name of "Eastern-Columbia, Inc." The business consisted in conducting a general department store selling furniture, household furnishings, rugs, upholstery, clothing and wearing apparel.

On April 14, 1944, defendant filed a certificate of business stating that he was doing an upholstering and interior decorating business under the name of "Western Columbia Decorators." On November 22, 1944, he filed a new certificate of business, dropping the word "Decorators" and stating that he was doing business as Western Columbia. In this new certificate he stated the nature of his business as follows:

"Furniture, uph. and mfg. general furn. and appliances, household access. and draperies."

He thereafter caused to be painted on the window of his store the words "Western Columbia." Some time later he had a large sign installed on his store front with the words "Western Columbia Fine Furniture." The first two words were in large printing and the last two words in small printing.

The trial court found in favor of plaintiff's contention that the use by defendant of "Western Columbia" as a trade name was unfair, misleading and confusing in character in view of plaintiff's long continued use of the trade name "Eastern-Columbia." It further found that defendant had used the trade name "Western Columbia" with the express design and purpose of defrauding plaintiff, its customers and the public, and also with the express design and purpose of appropriating plaintiff's good will, business and reputation.

The court then enjoined defendant from using the words "Western Columbia" alone as the name or designation of his business, and from using the words "Western Columbia" jointly with any other word or words unless the same should be of the same size type or lettering or of the same design or style.

This is the sole question presented for our determination:

In view of the foregoing facts should the trial court have permanently enjoined defendant from using the words "Western Columbia" even in conjunction with other words?

[1] This question must be answered in the negative. It is the general rule that where a word has acquired a secondary meaning the first appropriator cannot as a general rule prevent another from using such words in conjunction with other words. The first user is limited to a decree enjoining the second user from using the word or words in a descriptive way so as to pass off his goods as the goods of the complainant. (Academy of Motion Pictures, etc., v. Benson, 15 Cal.2d 685, 691, 104 P.2d 650; Modesto Creamery v. Stanislaus, etc., Co., 168 Cal. 289, 294. 142 P.

845; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 392 et seq., 78 P. 879. See also, 1944, 150 A.L.R. 1129.)

In Academy of Motion Pictures, etc., v. Benson, supra [15 Cal.2d 685, 104 P. 652], the court said: "In all this class of cases where the word, name, or other mark or device is primarily publici juris the right to relief depends upon the proof." If the plaintiff proves that the words have been so exclusively identified with his business as to have acquired a secondary meaning in his business, he is entitled to protection against another's deceptive use. The court in the same passage declares the rule that "use by others may not be absolutely prevented, but only the misleading manner of using it will be enjoined, leaving defendant at liberty to use it in all honest ways not deceptive."

Now, in view of all the facts, namely, the nature and extent of plaintiff's business, the time and expense consumed in building up the good will which the phrase "Eastern-Columbia" now enjoys, the difficulty or facility to be encountered in using the words "Western Columbia" to prevent its misleading the average consumer from acting upon the assumption that the phrase means "Eastern-Columbia"— if it is practicable so to limit the injunction as to shear defendant's use of the phrase of all of its deceptive implications, there is no reason why the appellate court should set aside the decision of the chancellor below. In Weinstock, etc., v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St.Rep. 57, in which defendant had not only appropriated a name practically identical with that used by plaintiff but also had constructed a front with the same architectural style, the injunction compelled defendant to place signs inside and outside of his establishment to show that its proprietor was not the same as that of plaintiff's store next door. In Standard Oil Co. of New Mexico v. Standard Oil Co. of California, 10 Cir., 56 F.2d 973, 975, the injunction restrained defendant from using "any * * * name containing the words 'Standard,' 'Standard Oil,' or any similar name, or any variation thereof * * * so * * * 'as to lead to uncertainty and confusion.'" In L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 35 S.Ct. 91, 92, 59 L.Ed. 142, defendant was required to use Arthur A. Waterman instead of A. A. Waterman and to follow it with the phrase "not connected with the L. E. Waterman Co." in conspicuous letters. In Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 28 S.Ct. 350, 52 L.Ed. 616, defendant was forbidden to use "Hall" on its safes unless accompanied by information that defendant was not the original Hall's Safe and Lock Company or its successor, or that the article was not the product of the original company. See note, 150 A.L.R. 1130.

[2] From the foregoing it appears that the court below was not without judicial guidance in applying a remedy to the facts proved. Whether it should have decreed an absolute injunction or one restricting the prohibition to a denial of the use of the phrase "Western Columbia" except where it is emphasized that such words must not be understood to refer to appellant's places of business was a question necessarily involving the court's *judicial* discretion. In each of the authorities cited by appellant as authorizing an absolute injunction (Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 P. 1014; Jaynes v. Weickman, 55 Cal.App. 557, 203 P. 828; Benioff v. Benioff, 64 Cal.App. 745, 222 P. 835; Rosenthal v. Brasley-Krieger Shoe Co., 19 Cal.App.2d 257, 64 P.2d 1109), the trial court had found that not only was the appropriated name practically identical with that used as a trade name by the plaintiff, but in each instance the court had the advantage of all the proof and was thereby enabled to apply an intelligent discretion in determining the limitations of the injunction.

[3] It appears that the trial judge herein had in mind prohibiting defendant from repeating the fraudulent practices theretofore committed. In order to express more definitely the court's apparent intention to accomplish this result the judgment should be modified.

It is therefore ordered that the judgment be modified as follows: Strike from the third paragraph the words "unless such other word or words shall be of the same size type or lettering, and of the same design or style, as the words "Western Columbia" and substitute in lieu thereof "unless such words be accompanied by a word or words which will clearly indicate to any patron or consumer that defendant is not plaintiff".

As so modified the judgment is affirmed.

MOORE, P. J., concurs.

WILSON, Justice (dissenting).

I dissent. The injunction approved by the majority opinion is a mirage. The law demands realty. My disagreement with the opinion is that it has ignored well established and undisputed rules of the law of unfair competition that are applicable to the case, it has not given proper consideration to the facts as they appear in the findings of the trial court, and it has abandoned the theory of protection to the originator of a trade name and to the public that has been established by a long line of authorities. My objection to the original judgment and to the judgment as modified by the prevailing opinion is not directed to what is restrained but to what is sanctioned and permitted. The judgment does not go far enough in protecting appellant from unfair and unlawful competition and in preserving its good will, and it does not sufficiently safeguard the public from the fraud that the court expressly found to have been committed by respondent in adopting the trade name under which he has been transacting business.

The extent and character of the relief to be afforded in an action to restrain the piracy of a trade name must be determined with the aim (1) of protecting the originator of the name from injury occasioned to his business, good will, and reputation by its unauthorized use, and (2) of shielding the public from the fraud and deceit practiced by the offending party by acts that falsely lead the members of the public to believe that they are dealing with or purchasing merchandise manufactured by the first user of the name. Both of these elements of the foundation for a more efficacious injunction emerge from the findings in this action.

Since sufficient facts are not related in the majority opinion to furnish an understanding of the issues before the trial court and presented to this court by the appeal it is necessary to set them forth here. Among other things the court found:

(a) That appellant is and it and its predecessors in interest have been engaged in the retail merchandising business, selling a varied assortment of articles, including "household furniture, radios, records, household appliances, washing machines, men's and women's wearing apparel and kindred articles of merchandise, and in the upholstering and recovering of furniture, for upward of fifty years, under the distinctive trade names of 'Eastern,' 'Columbia,' and 'Eastern-Columbia' "; that under said names appellant has acquired a good will, and that the public generally throughout the County of Los Angeles and State of California have come to know and identify appellant as "Eastern" or "Eastern Columbia" and that it enjoys a reputation for honesty and integrity in its business.

(b) That in May, 1944, respondent commenced the operation of a retail store in Los Angeles under the name of Western Columbia Decorators, engaging in the business of recovering and upholstering furniture and decorating; that in November of the same year respondent abandoned the word "Decorators" and commenced the use of the words "Western Columbia" alone, under which he has continued to advertise and hold himself out as engaging in the business of "selling furniture, radios, records, household accessories, draperies and appliances." (This is the same line of merchandising in which appellant has been and is engaged.)

(c) "That the use and appropriation by defendant of said trade name Western Columbia in connection with his said business has been and is and will continue to be misleading, confusing and deceptive to the public generally; that it has, does and will, lead the public into believing that in dealing with defendant at his said place of business it is and will be dealing with plaintiff and that plaintiff is conducting a branch store at defendant's said place of business; that the use and appropriation of said trade name by defendant in connection with his said business constitutes unfair competition and already has and will continue to result in irreparable damage to plaintiff."

(d) "That defendant commenced the use and appropriation of said trade name Western Columbia and continues to use and appropriate the same with the express design and purpose of defrauding plaintiff, its customers and patrons, and the public generally, and with the express design and purpose of appropriating for his use and benefit the good will and business and reputation of the plaintiff and to divert the same from the plaintiff to the defendant; that the appropriation and use by the defendant of the word 'Columbia' in combination with the word 'Western' as his trade name is similar and identical to the use of the word 'Columbia' in combination with the word 'Eastern'; that in visual appearance and sound the appropriation and use of the combination of words 'Western Columbia' suggests the words 'Eastern Columbia' and constitutes unfair competition and that the same is inequitable and unjust and constitutes a fraud upon the public and will cause injury to the plaintiff's business and good will."

The judgment enjoins respondent from doing two things: (1) "from using, in any manner, the words Western Columbia alone as the name or designation of his business;" (2) "from using, in any manner, the words Western Columbia as the name or designation of his business, jointly or in conjunction with any other word or words, *unless such other word or words shall be of the same size type or lettering, and of the same design or style, as the words Western Columbia*." The majority opinion orders the emphasized portion stricken and the insertion of a condition in different language, but the amendment does not sufficiently protect either appellant or the public.

The findings furnish cogent reasons for the further enlargement of the injunction to the extent of preventing respondent from pretending to be what he is not, and from defrauding appellant and deceiving the public with a name appropriated for the purpose of decoying unwary and unsuspecting purchasers.

There are certain well established rules of law that must be taken into consideration in the decision of cases involving the alleged appropriation of a previously adopted and used corporate or trade name under which its user has acquired a reputation for honesty and fair dealing. These principles are ignored in the majority opinion.

A corporate name is in the nature of a property right, and the exclusive privilege of using it will be protected by the courts. Standard Oil Co. of New Mexico v. Standard Oil Co. of California, 10 Cir., 56 F.2d 973, 977; American Steel Foundries v. Robertson, 269 U.S. 372, 380, 46 S.Ct. 160, 70 L.Ed. 317, 321; Iowa Auto Market v. Auto Market & Exchange, 197 Iowa 420, 197 N.W. 321, 323. A trade name that has become of a pecuniary value or a business advantage likewise becomes a property right, and it, too, is entitled to protection from infringement. Standard Oil Co. of New York v. Standard Oil Co. of Maine, D.C.Me., 38 F.2d 677, 679; Peninsular Chemical Co. v. Levinson, 6 Cir., 247 F. 658, 661. An injunction will lie to prevent not only the use by another of the identical corporate name, but the use of any name which, by reason of similarity, will tend to create confusion and enable the later user to obtain the business of the first. Iowa Auto Market v. Auto Market & Exchange, supra.

Two cases are referred to in the majority opinion in which family names of members of the companies have been permitted, by reason of existing circumstances in each case, to be used by corporations that were in competition with other corporations that had previously appropriated and used the same family name in the same kind of business, provided the second user conveyed the information to the public that it was not connected with the first user of the name. See L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 35 S.Ct. 91, 59 L.Ed. 142; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 28 S.Ct. 350, 52 L.Ed. 616. The name chosen by respondent does not possess the virtue of being a family name but was chosen by him, as found by the trial court, "with the express design and purpose of defrauding plaintiff, its customers and patrons, and the public generally," and of appropriating to his own use and benefit the good will, business and reputation of plaintiff and of diverting the same from plaintiff to himself. The majority opinion, by its amendment of the judgment, follows the line of the family name cases.

Uniformity as well as accuracy is desirable in judicial opinions. The majority of this court have not always been of the opinion that an innocuous injunction, such as they have annexed to the judgment, is a sufficient protection against fraud when the defendant is using, not a fictitious name, but his own. In the opinion in Hoyt Heater Co. v. Hoyt, 68 Cal.App.2d 523, 157 P.2d 657, 659, which was joined in by the signers of the majority opinion in this action, the trial court had restrained the defendant from operating and advertising his business under his own name. In affirming the judgment this court said that "one must use his own name honestly and not as a means of pirating the good will and reputation of a business rival; and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business," and "that defendant could not use his own name in advertising his business without confusing and misleading the public to the detriment of plaintiff." The trial court found in the instant case that the use of the name "Western Columbia" is "misleading, confusing and deceptive to the public," and "constitutes a fraud on the public."

No authorities are cited in the opinion or in respondent's brief, and none have been called to my attention otherwise, except the family name cases referred to, that sanction the use of a previously appropriated name with an accompanying explanation that the business is not connected with that of the original user of the name. That such a theory of protection, which in fact safeguards but little, if any, of the good will and property right of the senior user of a name, has not been followed is exemplified by numerous cases in which the employment of a family name has been enjoined, only a few of which are hereinafter cited.

The inhibition on the usurpation of an established name is extended to the use of one's own name if such use is calculated to cause confusion or to deceive. A corporation is not entitled to use in its name or for its products the name of an individual, though the latter is interested in the corporation and consents to the use of his name, if the name has been selected in order to aid the corporation in competing with an established concern engaged in a similar business and if the name is calculated and intended to mislead the public in respect to the origin of the goods, and has the effect of promoting unfair competition. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 388-390, 78 P. 879; De Nobili Cigar Co. v. Nobile Cigar Co., 1 Cir., 56 F.2d 324, 328; Vick Medicine Co. v. Vick Chemical Co., 5 Cir., 11 F.2d 33, 35; R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 2 Cir., 70 F. 1017, 1018; G. B. McVay & Son Seed Co., Inc., v. McVay Seed & Floral Co., Inc., 201 Ala. 644, 79 So. 116, 118; L. Martin Co. v. L. Martin & Wilckes Co., 75 N.J.Eq. 39, 71 A. 409, 414; David E. Foutz Co. v. S. A. Foutz Stock Food Co., C.C.Md., 163 F. 408, 411; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 313 Ill. 106, 144 N.E. 787, 791.

The extent to which the courts will go in safeguarding the property right in a name and in shielding it from despoliation by a rival user, even though not engaged in a competitive business, whether it be a corporate name or a trade name and whether used by a corporation or by an individual, is illustrated by cases in which injunctions have been issued to restrain a newcomer from appropriating an established name in connection with an article wholly dissimilar to that manufactured or sold by the original user and which does not come into competition with the latter's merchandise. Injunctions are not limited to cases in which there is actual market competition. It is sufficient if the unfair practices of one will injure the other and if the reputation of the first user of the name for goods of a high quality and standard will be damaged by the representation of the second, that the first user produces merchandise that it does not in fact produce.

In the following examples the first and second users are indicated by numerals in connection with the goods which they respectively produced: (1) Food products, (2) oleomargarine, an item not produced nor intended to be produced by the first user: Del Monte Special Food Co. v. California Packing Corp., 9 Cir., 34 F.2d 774, 775. (1) Automobiles, (2) automobile tires: Akron-Overland Tire Co. v. Willys-Overland Co., 3 Cir., 273 F. 674. (1) Automobiles and aeroplanes, (2) radio tubes: Wall v. Rolls-Royce of America, Inc., 3 Cir., 4 F.2d 333, 334. (1) Electrical apparatus, switchboards, pumps and small internal combustion engines, (2) spark plugs: Duro Co. v. Duro Co., 3 Cir., 27 F.2d 339. (1) Hardware, locks and keys, (2) flashlights: Yale Electric Corp. v. Robertson, 2 Cir., 26 F.2d 972, 974. (1) Drug store supplies but not cigars, (2) cigars: Peninsular Chemical Co. v. Levinson, 6 Cir., 247 F. 658, 661. (1) Publisher of style magazine, (2) manufacturer of hats: Vogue Co. v. Thompson-Hudson Co., 6 Cir., 300 F. 509, 512. (1) Self-rising flour, (2) syrups and sugar creams: Aunt Jemima Mills Co. v. Rigney & Co., 2 Cir., 247 F. 407, 409, L.R.A.1918C, 1039. (1) Electric motors, hair driers, drink mixers, etc., (2) washing machines: Wisconsin Electric Co. v. Dumore Co., 6 Cir., 35 F.2d 555, 557. (1) Diamonds, jewelry and silverware, (2) production and distribution of motion pictures: Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N.Y.S. 459, affirmed 237 App.Div. 801, 260 N.Y.S. 821, affirmed 262 N.Y. 482, 188 N.E. 30. The same rule applies when the businesses of the parties are not directly competitive, although both are connected with the same industry, and where the defendant does not deprive the plaintiff of business that the latter would otherwise receive. Academy of Motion Pictures, etc., v. Benson, 15 Cal.2d 685, 688, 692, 104 P.2d 650.

In some of the cases hereinbefore cited the originator of the name had registered it as a trade-mark and that fact and the similarity of the names, either a corporate name or a trade name, are interwoven in the discussion. However, the presence or absence of a trademark is not the turning point of the cases. If the name has acquired a secondary meaning such registration is not a necessary condition to the granting of an injunction restraining the use of the name by the newcomer. Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 313 Ill. 106, 144 N.E. 787, 789; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 559, 28 S.Ct. 350, 52 L. Ed. 616, 620.

The rules deduced from the decisions may be thus summed up: (1) If the resemblance of the names is such that purchasers who are acting with reasonable caution will be misled, or if the similarity is calculated to deceive the ordinary buyer under ordinary conditions, the junior user will be enjoined from continuing the use of the name. (2) An established corporate name or trade name is a property right and will be protected against infringement. (3) Registration as a trade-mark is not necessary. (4) The use of one's own name may be prohibited if so used as to confuse or deceive. (5) The names need not be identical, but if so similar as to cause confusion or deception the newcomer will be enjoined. (6) The products identified by the names may be wholly dissimilar and need not be competitive.

The fictitious name adopted by respondent has been assumed by choice. There were thousands of other names at his disposal under which he could have established his own reputation and good will without attempting, by means of a sham and fraudulent device, to palm off his wares as those of appellant. A corporate name identifies not only the corporation but its business and the goods it sells and the services it performs. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. The court found that similarity was the means adopted by respondent for deception and that the name was selected "with the express design and purpose of defrauding plaintiff, its customers and patrons, and the public generally."

The important fact is that the business in which respondent is engaged, to wit, that of selling furniture, radios, records, household accessories, draperies and appliances, and recovering and upholstering furniture, is identical with that in which appellant and its predecessors have been engaged for many years and which appellant has carried on under the name of "Eastern Columbia" since 1939, five years before respondent adopted "Western Columbia." Appellant's name has been used so long and has been so exclusively identified with its business that it has acquired a secondary meaning, that is to say it indicates appellant's business and merchandise and nothing else. Greater protection from the deceptive use of a similar name by another person or corporation should be accorded than is given in the judgment approved by the prevailing opinion.

Without violating the injunction now in force respondent may establish a store immediately adjacent to appellant's place of business and use the name "Western Columbia Upholstery," "Western Columbia Department Store," "Western Columbia Furniture," or any other words in connection with "Western Columbia" that will indicate to the public that they are purchasing the same character of merchandise as that sold by appellant, provided only that words be added indicating that "defendant is not plaintiff." The deception lies in the similarity of "Eastern Columbia" and "Western Columbia," and in the identity of the type of goods dealt in by the parties, the vice of which is not eliminated by the required additional words on the store window and in advertisements. It is common knowledge that the name attached to a business is the catchword and that customers will not tarry to read the explanatory statement. Notwithstanding the finding of the trial court that respondent's use of "Western Columbia" as his trade name is and has been "misleading, confusing and deceptive to the public generally," and that it will lead the public into believing that "in dealing with defendant at his said place of business it is and will be dealing with plaintiff," the effect of the judgment as modified is to allow respondent to continue in his deception.

The majority decision evades the plain duty of an appellate court to correct an error of the trial court whether the judgment enjoins too little or the relief granted is excessive. A court of equity must exercise its power and perform its full duty in arriving at a solution of the questions presented, and to the end that complete justice be done it should either enlarge or abridge the relief awarded by the trial court to the extent warranted by the facts. The order modifying the judgment does not expand the injunction sufficiently to give the protection to appellant and to the public that is required by the facts and the applicable law.

This court has the benefit not only of the findings but of a transcript of the evidence that sustains them and that clearly demonstrates the fraudulent purpose of respondent in adopting his trade name. This court therefore is in the same position as the trial court to apply discretion in determining the terms of the injunction warranted by the law and the facts.

The majority opinion declares, erroneously, that it is the general rule that where a word has acquired a secondary meaning the first appropriator cannot prevent another from using such word in conjunction with other words, and that the relief to which the first user is entitled is limited to enjoining the second user from employing the word or words in a descriptive way so as to pass off his goods as those of the complainant. This statement is in complete disaccord with the principles repeatedly declared in the decisions to which reference has been hereinbefore made.

That the purported "general rule" stated by the majority is not a rule is demonstrated by the cases which I have cited wherein it is announced as virtually a unanimously approved precept that the senior user of a name is entitled to an injunction restraining the junior user from appropriating the same word or words whether the parties are engaged in the same kind of business or in noncompetitive pursuits.

The sterility of the amendment to the judgment is shown by the absence of authorities supporting or suggesting such an indulgent injunction. The text of the opinion is not sustained by the three cases cited in its support: (1) In Academy of Motion Picture, etc., v. Benson, 15 Cal.2d 685, 104 P.2d 650, Mr. Justice Shenk, speaking for the court, points out that the business of the parties was not directly competitive although both were connected with the motion picture industry, and that by the use of the name adopted by the defendant the latter did not take from the plaintiff and draw to herself any business which the plaintiff otherwise would receive; nevertheless, said the court, the plaintiff was entitled to have the defendant enjoined "from any deceptive use of words which in the public mind will confuse the plaintiff's and the defendant's businesses." At page 688 of 15 Cal.2d, at page 652 of 104 P.2d. The court further said that it was not necessary that the parties be in competitive businesses but it was enough if the names, although not identical, were sufficiently similar to cause confusion and injury. At page 692 of 15 Cal.2d, at page 652 of 104 P.2d. Contrasting the facts in that case with those in the instant action, the businesses of the parties here are "directly competitive" and respondent takes "from the plaintiff and draws to [himself] business which the plaintiff otherwise would receive." In the Academy case the court declared that the defendant should be enjoined from "any deceptive use of words" that would confuse the public, but such approved relief is denied to appellant here. (2) The case of Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879, 882, comes within the group of cases relating to the incorporation of an individual's name in the name of a corporation. The court said that Dodge could not confer the right to use his name upon the corporation for the purpose of enabling it to engage in a business that had been conducted by another corporation under a similar name; that the incorporators of the second company had no right "to fraudulently adopt a name similar to plaintiff's name for the purpose of palming off the business to be conducted by the new corporation as plaintiff's business, and thus invade the rights of the prior corporation;" that the court should take into consideration the fact that the business conducted by the defendant corporation was the same as that conducted by the plaintiff and that the court had a right to restrain the defendant from using a name so similar to plaintiff's name as to mislead the public into believing that the defendant's business was the same establishment as that which had been maintained by the plaintiff under that name. At pages 388–390 of 145 Cal., at page 882 of 78 P. (3) There is nothing in the case of Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 P. 845, that supports the text of the majority opinion. That was an action to restrain unfair competition in which an injunction was sustained restraining the defendants from imitating a label consisting of the word "Modesto" in connection with a symbol or device on butter wrappers. The restraint went not to the use of the word alone but to its use with a symbol in such manner as to deceive the public into purchasing the defendant's product in the belief that the plaintiff had produced it.

The injury to appellant by the infringement on its name lies not only in the financial loss occasioned by reason of sales that may be made by respondent to persons who believe that they are dealing with appellant, but in the representation that the merchandise sold or services performed by respondent are sold or performed by appellant when in fact the latter has no control over them. Its reputation for fair and honest dealing is thus in jeopardy, since respondent is indifferent to the maintenance of appellant's good name and is at liberty to sell goods and services of a quality inferior to those that the public is accustomed to procure from appellant.

Although the findings were all in favor of appellant the judgment as modified permits respondent to continue the unfair competition that gave rise to the action, provided only that he uses words indicating that he is not the plaintiff, which gives but a soupcon of protection.

This is not a case of innocent or unintentional trespass on appellant's good will. It was a deliberate and premeditated act on the part of respondent and the court found that it was done for a fraudulent purpose, was inequitable and unjust, and constituted a fraud on the public. No equities rest on respondent's side of the case.

A judgment should be explicit and certain and should so delimit the respective rights of the parties that future litigation and construction will be unnecessary. In this particular the judgment in the form approved by the majority is deficient. If respondent should use the words "Western Columbia" in connection with other words he is required to notify the public that he is not the plaintiff, but the manner of giving such notification is not specified. The protective feature of the judgment of the trial court that any other words shall be of the same size, style and design of lettering is omitted. The explanatory words may be so diminutive as to pass unnoticed by the casual observer, and need not be "in equally large and conspicuous letters" as was required in the Waterman Pen case (L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 93, 35 S.Ct. 91, 59 L.Ed. 142, 145), or in letters of the same size and character, as prescribed by the trial court.

In Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, at page 539, 42 P. 142, at page 145, 30 L.R.A. 182, 50 Am.St.Rep. 57, the court said: "The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader," and (at page 541, of 109 Cal., at page 146 of 42 P.): "Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals."

Appellant is entitled to a judgment restraining the invasion of its property right in its name and the impairment of its good name and good will, and one that will prevent the foisting of respondent's merchandise on the public in a manner calculated and intended to deceive.

The judgment should be modified by adding a provision restraining respondent from using the words "Western Columbia" in conjunction with any other word or words on or about any establishment in which merchandise is sold or offered or advertised for sale similar to or in competition with the merchandise dealt in by appellant, and from using said words in connection with or in advertising any business in competition with appellant's business, or in any manner calculated to cause purchasers to believe that they are dealing with appellant.

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SECOND SERIES

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29 Cal.2d 541

ZASLOW et al. v. KROENERT et al.

L. A. 19782.

Supreme Court of California, in Bank.

Dec. 30, 1946.

1. Taxation 🔑734(2)

Over-levy of 83 cents in real estate taxes assessed against realty over period of several years did not invalidate entire tax levy, and tax deed to purchaser at tax sale was valid.

2. Tenancy in common 🔑3

One who purchased realty on foreclosure of street bonds issued under Improvement Act, and one who purchased realty at tax sale, were "tenants in common" on vesting of title from the respective taxing agencies.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

3. Tenancy in common 🔑21

Each tenant in common is entitled equally to share in possession of entire property, and neither may exclude the other from any part of it.

4. Tenancy in common 🔑38(3)

On proof of ouster by one tenant in common of another and a demand for entry by one out of possession and refusal by one in possession, ousted tenant is entitled to recover common possession of the premises in trespass action.

5. Tenancy in common 🔑38(9)

A tenant in common, who has been ousted by another, is entitled to recover damages resulting from the ouster, and such damages ordinarily amount to ousted tenant's share of the value of the use and occupation of the land from time of ouster.

6. Tenancy in common 🔑14

An "ouster" in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Ouster".

7. Tenancy in common 🔑14

Ouster of a tenant in common must be proved by acts of an adverse character, such as act of the ousting tenant in claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter, and actual or constructive possession of ousted tenant in common at time of ouster is not necessary.

8. Tenancy in common 🔑14

Where one tenant in common denied other tenant in common's title, and her agent, acting under her direction, changed locks on doors, posted "no trespassing" signs on the property, and denied the other tenant admittance on demand, there was an "ouster" of the other tenant, entitling him to damages for trespass and conversion.

9. Tenancy in common 🔑38(9)

Where rental value of realty for period during which one tenant in common ousted the other tenant only amounted to about $325, and, though special damages were pleaded, no proof was offered, an award of $1,400 against tenant doing the ousting and for ousted tenant in action for damages for trespass was reversed.

10. Partition 🔑23

Where there was no showing that tenant in common who was ousted by other tenant could not regain common possession of the premises and no showing that ouster was permanent, damages for loss of use afforded ousted tenant adequate relief, and he was not entitled to force a sale of his interest in the property on the other tenant.

11. Trover and conversion 🔑4

Generally, "conversion" is any act of dominion wrongfully exerted over another's personalty in denial of or inconsistent with his rights therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

12. Trover and conversion 🔑9(1)

The liability of one in possession of realty for the conversion of personalty which he finds on it depends on a determination of whether defendant's conduct indicates an assumption of control or ownership over the goods, and, under such circumstances, refusal of one in possession of realty to permit, on demand, owner of chattels, which were left there, to remove them, constitutes "conversion".

13. Trover and conversion 🔑1

If possessor of realty appropriates chattels to his own use in obvious defiance of owner's rights, he is liable to the owner for the conversion of them.

14. Trover and conversion 🔑4

The act of taking possession of a building and locking it does not, of itself, constitute a "conversion" of the personalty within the building.

15. Trover and conversion 🔑4

The permission of the possessor of realty by which personalty is allowed to remain on the premises does not make him liable for conversion of the personalty.

16. Trover and conversion 🔑35

To establish a conversion, plaintiff must show an intention or purpose to convert the goods and to exercise ownership over them or to prevent the owner from taking possession of his property.

17. Tenancy in common 🔑27

If conduct of tenant in common in wrongfully excluding other tenant in common from the premises, on demand by other tenant for return of chattels on the premises, prevented removal of chattels, such acts would have constituted evidence of a conversion.

18. Action on the case 🔑1
Trespass 🔑6, 49

Where conduct complained of does not amount to a substantial interference with possession of or right to chattels allegedly converted, but consists of intermeddling with or use of or damage to chattels, owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of impairment of the property or the loss of its use.

19. Trover and conversion 🔑62

Award of $1,200 for conversion of personalty was excessive, where $3,500 was the highest value placed on the goods and they were not damaged while in storage for about four months.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge pro tem.

Action for damages for trespass and conversion by M. Zaslow and others against Helene Kroenert and others. From a judgment for the plaintiffs, the defendants appeal.

Judgment reversed with directions to trial court to redetermine the amount of damages caused by ouster and trespass.

Prior opinion 168 P.2d 780.

Kaplan & Livingston, Alfred L. Armstrong and Harold D. Berkowitz, all of Los Angeles, for appellants.

Ernest A. Oswald and Richard A. Haley, both of Los Angeles, for respondents.

EDMONDS, Justice.

Marcus Zaslow, who obtained title to certain real property by the foreclosure of a street assessment bond, sued Helene Kroenert and John Chapman for trespass and conversion. At the time the controversy arose, Mrs. Kroenert was the grantee in a tax deed made by the state. The appeal from the judgment in favor of Zaslow primarily presents for decision the question as to the rights of the respective parties under their titles.

The allegations of the complaint in the count charging trespass are that Marcus Zaslow, individually and as attorney in fact for Henry F. Zaslow, had enjoyed the quiet and peaceable possession of the premises from 1935 to May 15, 1944. On that date defendants forcibly broke into and entered the premises. A "No Trespassing" sign was posted and the locks changed. Because of the acute housing shortage in the area, plaintiff has been unable to find housing facilities to his great and irreparable injury. These acts were committed "with wanton and malicious motives and with a reckless disregard of the rights and privileges of plaintiff", resulting in hardship and oppression. Moreover, they occurred while a quiet title action between the same parties involving the same property was under submission and before judgment. As a result of the forcible entry and the continued use of the premises, the plaintiff suffered damage in the amount of $9,000.

Another count of the complaint incorporates by reference most of these allegations, and charges that the plaintiff was lawfully and peaceably possessed of certain personal property located on the premises. The defendants "unlawfully and without right or color of right" took this property from the premises and converted it to their own use, damaging the plaintiff in the sum of $3,500. The relief asked is for restoration to possession of the premises, and a judgment in the amounts of $100 per month from May 15, 1944, $14,500 for general damages, and $5,000 for punitive damages.

By answer the defendants denied generally and specifically all of the allegations in each count. The evidence presented upon the issues as framed by these pleadings is without substantial conflict. It appears that in 1931, the real property in controversy was deeded to the state for delinquent taxes. Four years later, Marcus Zaslow went into possession of it following the foreclosure of a street bond issued under the Improvement Act of 1911, St. 1911, p. 730. He testified that he was the owner of the property; that he bought and paid up all of the outstanding street assessment bonds, "Second Street * * * to the Ocean Front." After he foreclosed a street bond, he obtained a judgment quieting his title to the property in fee subject to the sale for taxes. He paid some, but not all, of the delinquent taxes under a ten-year plan. About this time he conveyed the land to Henry F. Zaslow, his son, and it appears that during later years title passed back and forth between them. However, it is not charged that there has been any deficiency of title by reason of these transactions which bars the cause of action pleaded on behalf of Marcus Zaslow individually and as attorney in fact for his son.

In 1941, while Marcus Zaslow was in possession of the property, he leased the property from the state at a monthly rental of $8. The instrument provided that in the event of a sale of the property by the state while the lease was in effect, the lessor might cancel it as of the date of sale and, under such circumstances, the lessee would be entitled to a refund of any unearned portion of rental which might have been paid in advance. On October 7, 1943, Zaslow leased the property to Dorothy Dobis "for a couple of months * * * until she was able to find a bigger place for her sister and herself." The sublessee entered into possession and remained until on or about May 15, 1944. Her rent was paid to and including May 21, 1944.

Meanwhile, the taxes on the property remained due and unpaid and in November, 1943, Helene Kroenert purchased the property at a tax sale for $4,700, overbidding Marcus Zaslow's offer of $4,600. It was stipulated during the trial that "the State of California, acting by and through the Tax Collector of the County of Los Angeles, did, on November 19, 1944, execute and deliver to Helene Kroenert the tax deed on the property here involved." This deed, the parties agreed, conveyed to Helene Kroenert all of the right, title and interest which the state acquired in 1931 by reason of the nonpayment of taxes for the years 1927 through and including 1931. The stipulation also recited that there was an overcharge of taxes assessed during these years which amounted to a total of eighty-three cents.

The State Controller, on December 10, 1943, notified Marcus Zaslow of the tax sale and of the cancellation of his lease agreement as of November 19th. An application for refund of unearned rent was enclosed. This notice and any rights of Helene Kroenert were ignored by Marcus Zaslow, who continued to receive rentals under the sublease.

On January 26, 1944, Helene Kroenert filed an action to quiet title to the property (Kroenert v. Zaslow, Cal.Sup., 176 P. 2d 8,) naming various defendants, including Marcus Zaslow. During the pendency of this action, Dorothy Dobis and her sister, at the request of Zaslow, endeavored to find another apartment. Meanwhile, Marcus Zaslow moved into the premises and slept there for a few days. One morning after Zaslow had left to go to his business, Mrs. Dobis, through Chapman, found other quarters and vacated the premises, leaving the doors open and unlocked. According to Chapman's testimony, she told him that, as the rent was paid for two more weeks, he could have possession of the property. Immediately Chapman, acting as agent for Helene Kroenert, entered the premises, took possession of them, posted "No Trespassing" signs, and changed the locks on the doors.

Marcus Zaslow, upon returning that evening, was unable to gain entrance. He returned a few days later and found Chapman there. Zaslow asked him who put the lock on a hamburger stand which occupied part of the premises and Chapman replied, "I took it off * * *. With a hammer. I knocked it off and put mine on." According to Zaslow's testimony he understood Chapman to say, "Don't you dare to come close. You will find your head knocked off." Zaslow thought Chapman had a sledge hammer in his possession at the time. Chapman, on the other hand, denied that he threatened or even spoke to Zaslow on that occasion. But on the following day, according to Chapman, Zaslow and his attorney asked permission to get into the place. Chapman replied, "No, you can't get in the house. You will have to see the attorney." Chapman said he changed the locks because there had been three robberies there.

Later, Mrs. Kroenert's attorney sent a letter, dated May 19th, to Marcus Zaslow, notifying him that he could secure his personal property left on the premises by applying at the attorney's office. If the goods were not called for within 10 days, the letter stated, they would be put in storage to be held at Zaslow's expense. Although Zaslow denied receiving the letter, he admitted that Mrs. Kroenert's attorney showed it to him when he visited his office about a month and one-half or two months later. The record shows no demand for the return of the personal property, the value of which, Zaslow testified, was about $3,500. The rental value of the house was $40, and of the hamburger stand, $35 a month.

The trial court found that substantially all of the allegations of the complaint were true. Specifically, it declared that Mrs. Kroenert and Chapman, as her agent, forcibly broke and entered the premises without the consent, express or implied, of Zaslow and have, since that date, continued to use and occupy them to his damage in the amount of $1,400. The court also found that the defendants converted plaintiff's personal property to their own use to his damage in the sum of $1,200. Punitive damages in the sum of $300 were awarded plaintiff upon a finding that the breaking and entering of the premises and the conversion of the personal property was done "wantonly and maliciously and with reckless disregard of the rights and privileges of the plaintiff."

As grounds for reversal of the judgment entered upon these findings, the appellants rely upon a number of points. Of determinative importance is their contention that, assuming the property was conveyed to Zaslow upon the foreclosure of the street bond, he was then a tenant in common with Mrs. Kroenert and cannot maintain an action in trespass against her. Zaslow asserts that there was no such tenancy because of the overcharges in the assessments made against the property. He argues that the tax validation statute of 1943 (Stats.1943, p. 1993, 3 Deering's Gen.Laws, act 8443) is not applicable to the tax deed to Mrs. Kroenert because his rights intervened between the commission of the errors in the tax levy and the effective date of the statute. But assuming the validity of the tax deed, he maintains that, as a tenant in common, he is entitled to past and prospective damages by reason of his ouster. Accordingly, he argues, he has the right to elect to sue for damages past and prospective, waive the invasion, and consent to the continued occupancy of the land by them. Upon this theory, the damages awarded by the trial court for trespass are proper. Judgment was also properly awarded for the conversion of the personal property, Zaslow contends, and the findings as to the damages suffered by him by reason of the conversion, and also as punishment for the wrongdoing, are supported by the evidence.

[1, 2] The record shows that the alleged over-levy which is the basis of the charge that the title conveyed by the state is invalid, resulted in raising more money for the various tax years than actual budget requirements, because of a failure of the board to anticipate revenues from solvent credits and personal property taxes. This over-levy amounted to a total of eighty-three cents in the taxes assessed against the property for the years in question. But this court recently held that a minor over-levy "Did not invalidate the entire tax levy and must be deemed to have been waved by failure to enter an appropriate objection." Compton v. Boland, 26 Cal.2d 310, 313, 158 P.2d 397, 398. Applying that rule, the deed to Mrs. Kroenert conveyed a valid title regardless of the effect of the tax validation statute of 1943, and the questions raised in Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531, as to whether the tax validation statute applies to cure jurisdictional requisites or to deprive a person of vested property rights, are not here present. Accordingly, as Zaslow and Kroenert were each a purchaser of the entire parcel of land at a tax sale, they became tenants in common upon the vesting of title from the respective taxing agencies. Monheit v. Cigna, 28 Cal.2d 19, 27, 168 P.2d 965.

[3-5] Each tenant in common equally is entitled to share in the possession of the entire property and neither may exclude the other from any part of it. Krum v. Malloy, 22 Cal.2d 132, 135, 137 P.2d 18; Ochoa v. McCush, 213 Cal. 426, 431, 2 P.2d 357; Wood v. Henley, 88 Cal.App. 441, 452, 263 P. 870. Upon proof of ouster and a demand for entry by the cotenant out of possession and a refusal by the cotenant in possession the ousted cotenant is entitled to recover common possession of the premises. Phelan v. Smith, 100 Cal. 158, 167, 34 P. 667; Carpentier v. Webster, 27 Cal. 524, 563; Cardoza v. Machado, 46 Cal.App.2d 809, 811, 117 P.2d 31; see 14 Am.Jur. 143. And one tenant in common ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to his share of the value of the use and occupation of the land from the time of the ouster. Miller v. Myers, 46 Cal. 535, 539; Carpentier v. Mitchell, 29 Cal. 330, 334; Carpentier v. Mendenhall, 28 Cal. 484, 488, 87 Am.Dec. 135; Cardoza v. Machado, supra, 46 Cal.App.2d at page 812, 117 P.2d 31; Estergren v. Sager, 39 Cal.App.2d 401, 404, 103 P.2d 177; see 14 Am.Jur. 143; 7 Cal.Jur. 367.

[6-8] An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession. The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter. Actual or constructive possession of the ousted tenant in common at the time of the ouster is not necessary. Cardoza v. Machado, supra, 46 Cal.App.2d at page 811, 117 P.2d 31, citing Carpentier v. Webster, supra, 27 Cal. at page 563, and 62 C.J. 426, § 32. The acts of Mrs. Kroenert in the present case were sufficient to constitute an ouster, and Zaslow is entitled

to recover common possession of the premises and damages for loss of use. Mrs. Kroenert denied Zaslow's title. Her agent, Chapman, acting under her direction, changed the locks on the doors, posted "no trespassing" signs on the property, and denied Zaslow admittance upon demand. Whether or not the sublessee consented to the possession by Kroenert is of no significance. The wrong or ouster took place when Mrs. Kroenert denied Zaslow's title and refused him common possession.

[9] However, a reversal is required because the award of $1,400 damages for the ouster finds no support in the evidence. The rental value of the premises was $75 a month. Mrs. Kroenert, through Chapman, took possession of the premises on May 15, 1944, and the judgment was rendered on September 25th of the same year. The rental value for that period would only amount to about $325, and although special damages were pleaded, no proof was offered in this regard. Furthermore, it is clear from the briefs, the findings, and the decision in Kroenert v. Zaslow, Cal. Sup., 176 P.2d 8, that the case was tried, and damages awarded, upon the theory that Mrs. Kroenert had no interest in the property because her tax deed from the state was invalid.

[10] Relying upon Slater v. Shell Oil Co., 58 Cal.App.2d 864, 137 P.2d 713, 715, Zaslow contends that he may force a sale of his interest in the property upon the appellants. In that case, the plaintiff recovered a judgment in a prior action for damages caused by the defendant's act of laying pipe across his land. He then sued in ejectment on the same cause of action. The court held that the former judgment was a bar, saying: "* * * The right to sue for ejectment and damages * * * are nevertheless independent and inconsistent causes of action based upon the same invasion of the same right," and where "A party elects to sue for damages past and prospective he is deemed to have waived the invasion and consented to the continued occupancy of the land." But this rule will not permit Zaslow to waive all of his interest in real property, in effect abandon his property to the cotenant, and force a sale on Mrs. Kroenert. Where, as here, there is no showing that a coowner cannot regain common possession of the premises and that the ouster was permanent, damages for loss of use afford the plaintiff adequate relief. See Miller v. Myers, supra; Carpentier v. Mitchell, supra; see 63 C.J. 1049 et seq.

[11-13] Stated generally, "Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." Gruber v. Pacific States Sav. & Loan Co., 13 Cal.2d 144, 148, 88 P.2d 137, 139, see Aronson v. Bank of America, etc., Assn., 9 Cal.2d 640, 643, 72 P.2d 548. The liability of one in possession of real property for the conversion of personal property which he finds upon it, depends, in most cases, upon a determination of whether the conduct of the defendant indicates an assumption of control or ownership over the goods. It is clear that, under some circumstances, refusal of one in possession of real property to permit, upon demand, the owner of chattels which were left there to remove his goods, constitutes conversion. Gruber v. Pacific States Sav. & Loan Co., supra, 13 Cal.2d at page 148, 88 P.2d 137; Edwards v. Jenkins, 214 Cal. 713, 720, 7 P.2d 702; Wolfe v. Willard H. George, Inc., 110 Cal.App. 532, 535, 294 P. 436; Atwood v. Southern Calif. Ice Co., 63 Cal.App. 343, 345, 218 P. 283; see 148 A.L.R. 650; 131 A.L.R. 171; 65 C.J. 41. And if the possessor of the real estate appropriates the chattels to his own use in obvious defiance of the owner's rights, he is liable to the owner for the conversion of them. Perkins v. Maier & Zobelein Brewery, 134 Cal. 372, 375, 66 P. 482; see Prosser on Torts, p. 108; 148 A.L.R. 655; 131 A.L.R. 174.

[14-16] However, every failure to deliver is not such a serious interference with the owner's dominion that the defendant should be required to pay the full value of the goods. (See Prosser on Torts, p. 106.) And the act of taking possession of a building and locking it does not, of itself, constitute a conversion of

the personal property therein. Nor does the permission of the possessor of the realty by which personal property is allowed to remain upon the premises make him liable for the goods. Poor v. Oakman, 104 Mass. 309; Edinburg v. Allen-Squire Co., 299 Mass. 206, 12 N.E.2d 718; Lawyers' Mtg. Inv. Corp. v. Paramount Laundries, 287 Mass. 357, 191 N.E. 398. See Persson v. McKay Coal Co., 200 Wash. 75, 92 P.2d 1108; Prosser on Torts, § 15; 131 A.L.R. 167 et seq. To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property. Thus, in Poor v. Oakman, supra, a person rightfully took possession of a building and put a new lock on the door. He knew that the owner of some furniture then in the building had a key to the old lock. It was held that, in the absence of any evidence tending to prove a claim to the furniture, or any act which hindered the owner from removing it, as the contest was for the possession of the building, the possessor of the real estate was not liable for conversion of the furniture. Substantially the same rule was applied in Lawyers' Mtg. Inv. Corp. v. Paramount Laundries, supra, where the court decided that the act of taking possession of a building and keeping it locked did not, of itself, constitute a conversion of the machinery in it. And ordinarily the courts have declared that one rightfully in possession of real property who removes, to a warehouse or other place, chattels found on it belonging to another, does not assert ownership or control over them to the extent of making him liable for conversion. See 131 A.L.R. 172, and cases cited therein; Prosser on Torts, pp. 102, 103.

[17] In the present case, the court found only that Mrs. Kroenert and Chapman "took and carried away all the personal property and effects" of Zaslow, such taking being without his consent, express or implied. Admittedly, what Chapman did in this regard was to place the goods in storage: there is no evidence tending to prove that either he or Mrs. Kroenert otherwise exerted any dominion over Zaslow's personal property in denial of or inconsistent with his rights. If, upon demand for the return of the chattels, they had prevented the removal of the goods, such acts would have constituted evidence of a conversion. But here the controversy between the parties concerned the occupancy of the house; no demand was made for the return of the personal property. While there is no evidence showing any conduct amounting to conversion, there is proof that Chapman, as the agent of Mrs. Kroenert, acted as custodian of the goods, recognizing Zaslow's complete title and right to them. The defendants did not use the goods. About a month and one-half after Mrs. Kroenert, by Chapman, took possession of the realty, she stated in a letter either received by or shown to Zaslow, that he could secure possession of his personal property by applying at the attorney's office. Zaslow neither said nor did anything in response thereto.

[18, 19] Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. See Prosser on Torts, pp. 102, 103, 107; Rest., Torts, §§ 217, 218, 219. As Zaslow was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, Chapman's act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, Zaslow is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use. But as the evidence shows $3,500 as the highest value placed upon the goods and it is undisputed that they were not damaged while in storage for about four months, the amount awarded by the judgment has no support in the evidence.

For these reasons, the judgment is reversed with directions to the trial court to redetermine the amount of damages caused by the ouster and the trespass to the personal property.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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29 Cal.2d 878

Helene KROENERT, Appellant, v. Henry F. ZASLOW, Respondent.

L. A. 19417.

Supreme Court of California, in Bank.

Dec. 30, 1946.

Rehearing Denied Jan. 27, 1947.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action to quiet title to real property. Judgment for defendant reversed with directions.

Kaplan & Livingston, Alfred L. Armstrong, and Harold D. Berkowitz, all of Los Angeles, for appellant.

Ernest A. Oswald and Richard A. Haley, both of Los Angeles, for respondents.

EDMONDS, Justice.

Plaintiff, Helene Kroenert, sued to quiet title to the real property which is involved in Zaslow v. Kroenert, Cal.Sup., 176 P.2d 1. The trial court decided "that the deed to the State of California is illegal and void by reason of the overlevy of taxes * * * in the total amount of eighty-three cents," and "that the State * * * could convey to the plaintiff, Helene Kroenert, no greater title than it possessed and by reason thereof the title conveyed by said State to the plaintiff is illegal and void." However, in the companion case it was held that the error in assessment did not invalidate the deed to Mrs. Kroenert and, upon the vesting of title in her, she and Zaslow became owners of the property as tenants in common. The reasons there stated require the same determination in the present case.

The judgment is, therefore, reversed with directions to the superior court to enter judgment in favor of Helene Kroenert in accordance with the conclusions stated in Zaslow v. Kroenert.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concurred.

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29 Cal.2d 466

ALLEN et al. v. CALIFORNIA WATER & TELEPHONE CO. et al.

L. A. 18809.

Supreme Court of California, in Bank.

Dec. 19, 1946.

1. Waters and water courses 🔑107(3), 152(6)

Burden was on water company pumping and transporting underground waters from river basin of proving existence of surplus water in basin subject to appropriation and removal. Const. art. 14, § 3.

2. Appeal and error 🔑994(3), 1012(1)

The credibility of testimony of witnesses and weight to be given thereto are matters committed to trier of facts in case of expert as well as of lay testimony.

3. Waters and water courses 🔑130

The leakage of water from a dam in Mexico of the Tia Juana river whose watershed is in Mexico and return flow from a Mexican water project, on entering California became subject to appropriation under laws of California as against contention that such waters were merely waste or foreign waters. Const. art. 14, § 3.

4. Waters and water courses 🔑107(3), 152(8)

In action by owners of lands overlying underground waters of river basin to enjoin water company from pumping and transporting water from basin, evidence failed to show that amount of water awarded to plaintiffs was unreasonable or excessive. Const. art. 14, § 3.

5. Waters and water courses ⚷128

The constitutional enjoinder against waste of water does not mean that a riparian owner must either clear all water consuming native growth from his land or else permit a lowering of underline water table below the roots even if such lowering is otherwise inadvisable. Const. art. 14, § 3.

6. Waters and water courses ⚷100, 101

An owner of lands overlying underground waters of river basin, considering the varying toleration of vegetation to salinity, is not limited to raising only such crops as have a high degree of tolerance, but he is entitled to sufficient water for such crops as may normally be raised under conditions of noninfringement of his water supply. Const. art. 14, § 3.

7. Waters and water courses ⚷101

Where owners of lands overlying underground waters of river basin had for many years developed their supply by individual pumping from shallow wells, and such method of use was not unreasonable, they were not required to centralize, localize or scatter their pumping, or to unduly deepen their wells, or to undertake any other operation entailing a substantial increase of cost merely to enhance the surplus for a water company pumping and transporting water from the basin. Const. art. 14, § 3.

8. Waters and water courses ⚷100, 101

The amount of water required to irrigate lands overlying underground waters of river basin should be determined by reference to system used in the locality, although it may result in some waste which might have been avoided by adoption of another distribution system. Const. art. 14, § 3.

9. Appeal and error ⚷882(3)

In action by owners of lands overlying under ground waters of river basin to enjoin water company from transporting underground waters from basin, where defendant put in issue right of all overlying owners regardless whether they were parties to the action, and case was tried on such theory, defendant could not complain on appeal that trial court erred in treating the basin as a unit and in calculating water requirements of all overlying owners. Const. art. 14, § 3.

10. Appeal and error ⚷927(2)

Where both findings and judgment recited dismissal of cross-complaint against numerous cross-defendants, it would be assumed, in absence of showing to contrary, that all proceedings leading to the judgment were correctly pursued and that cross-complaint was regularly dismissed against cross-defendants named in the recitals of the judgment to that effect. Code Civ. Proc. § 581.

11. Judgment ⚷707

Owners of lands overlying underground waters of river basin who were not parties to action to enjoin water company from pumping water from basin for export at time of entry of judgment therein were not bound by it, nor did judgment specifically run in their favor, although it might be inferentially favorable to them in its protection of the water supply as a whole. Code Civ.Proc. § 581; Const. art. 14, § 3.

12. Waters and water courses ⚷107(3), 152(11)

In action by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, where issue with respect to danger of salt water intrusion was raised, plaintiffs and other owners appearing as cross-defendants were entitled to relief which would protect them to extent of their individually declared rights and which would also protect them against any exportation of water which would unduly increase their cost of use or lower the underground water level below the danger point. Const. art. 14, § 3.

13. Waters and water courses ⚷107(3), 152(12)

Decree enjoining defendant water company from pumping and transporting underground waters of river basin in excess of specified quantity, but excepting surface flow of waters which would otherwise waste into ocean was modified by permitting defendant company, until further order of court under a retained jurisdiction, to pump water from its wells for export when surface waters were flowing in river which, if not intercepted by such pumping operations, would waste into ocean. Const. art. 14, § 3.

14. Waters and water courses ⚿128

The policy inherent in water law of California is to utilize all water available. Const. art. 14, § 3.

15. Waters and water courses ⚿107(3), 152(12)

Decree enjoining defendant water company from pumping and transporting underground waters of river basin of Tia Juana river rising in Mexico in excess of specified quantity, but excepting surface flow of river which would otherwise waste into ocean, was modified to retain jurisdiction so that trial court could consider effect of added source of water resulting from water returning to river as result of leakage and return flow from Mexican dam and provide for its use so long as it was available. Const. art. 14, § 3.

16. Waters and water courses ⚿107(3), 152(10)

In action by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, refusal of defendant company's request to have matter referred to Division of Water Resources for solution or advice under statute was not error under circumstances. Water Code, § 2000 et seq., 4200, 4201; Const. art. 14, § 3.

17. Waters and water courses ⚿107(3), 152(10)

The Water Commission Act does not place positive duty on trial court to refer a problem involving conflicting water rights to Division of Water Resources for solution or advice, but such reference is discretionary. Water Code, §§ 2000 et seq., 4200, 4201; Const. art. 14, § 3.

18. Compromise and settlement ⚿15(1)

A resolution of city's governing body approving contract settling controversy with water company and providing that company would endeavor to develop additional and independent supply of water to lessen burden on city did not estop city from joining in suit to enjoin company from pumping water from river basin for export. Const. art. 14, § 3.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marvin L. Allen and others against California Water & Telephone Company to enjoin defendant from pumping and transporting from watershed underground waters of the Tia Juana River Basin, for a declaration of rights, and for other relief, wherein defendant filed a cross-complaint against George Ahlborn and others for a determination of the interests of the various cross-defendants, and for other relief. From an adverse judgment, the defendant appeals.

Judgment modified and as so modified affirmed.

Prior opinion, 157 P.2d 663.

Bacigalupi, Elkus & Salinger, of San Francisco, Philip Storer Thacher, of San Diego, and Charles DeY. Elkus, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Spencer Burroughs, C. C. Carleton and Henry Holsinger, Deputies Atty. Gen., A. L. Cowell, of Stockton, Ronald B. Harris, of Fresno, Harry W. Horton, of El Centro, W. H. Jennings, of La Mesa, C. F. Metteer, of Sacramento, and Maurice M. Myers, of Encinidas, as amici curiæ on behalf of appellant.

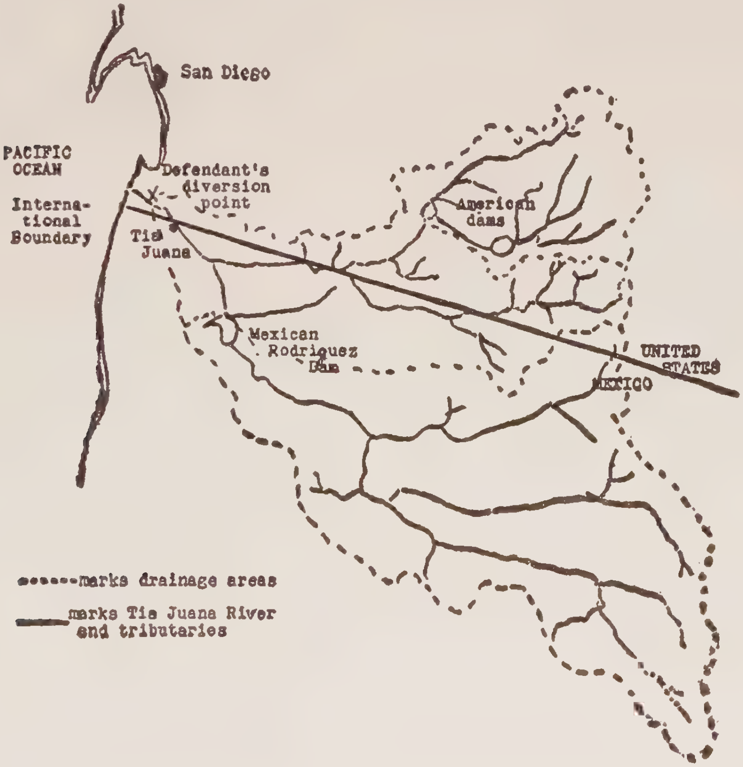
J. F. DuPaul, City Atty., Phil D. Swing, Charles C. Crouch and Shelley J. Higgins, all of San Diego, for cross-defendants and respondents.

SHENK, Justice.

This is an appeal from a judgment which declares plaintiffs' paramount rights, as overlying owners, to the underground waters of the Tia Juana River Basin, and restrains defendant in the exercise of its subordinate appropriative right to pump and export water to points without the watershed.

The main ground urged for reversal is that the trial court erred in concluding that there are in the basin no surplus waters available for exportation by defendant over and above the supply required to satisfy the reasonable, beneficial needs of riparian and overlying owners. It is also contended that because of the difficult and complex problems presented and the technical aspects of the case, the trial court should have acceded to defendant's repeated requests for the assistance of the Division of Water Resources.

The following rough chart will aid an understanding of the facts:



The Tia Juana River rises in the Republic of Mexico, whence it flows some 60 miles northwesterly, crossing the International Boundary, and emptying into the Pacific Ocean. Except for easterly areas in the United States drained by the Arroyo Seco and Cottonwood Creek, and not here involved, the watershed of the river is entirely in Mexico. All tributaries join the main stream before it reaches the United States. The distance from the point of crossing the International Boundary to the river's mouth is about six miles. The waters here in controversy are those contained in the natural basin which underlies these last few miles of stream flow in the United States.

Like most Southern California streams, the Tia Juana River has an intermittent and variable flow, not only from month to month and season to season, but from year to year. Although records have been kept for relatively few years, it is established that successive years of deficient rainfall, with practically no water running in the river bed in the United States, have been followed by a year or successive years of normal and also by excessive rainfall in which the valley has been swept by disastrous floods.

Various dams restraining tributary and main streams have been erected in the United States and in Mexico, greatly reducing the uncontrolled drainage area, and affecting the volume of main flow by reason of releases during period of high water, leakage, percolation, and return water from irrigation. The Rodriguez Dam in Mexico is located about 12 miles upstream from the International Boundary and upstream from the junction of Cottonwood Creek with the Tia Juana River, so that the waters impounded originate almost entirely in Mexico. It has a storage capacity of 110,000 acre feet or more. It was completed in 1936, and the only water flowing over its spillway was released during the heavy rainfall of 1940–1941. About two years after the dam began to function a return flow developed from the Mexican irrigation project below the dam site, and a serious leak appeared in one of the rock canyon walls, permitting the escape and return to the main stream of considerable water. The volume of this leakage is a subject of uncertainty, as is also the volume of return flow, but for purposes of this discussion the former may be estimated at a minimum of about 2,500 acre feet per annum, and the latter at 2,000 acre feet per annum. There has thus been produced a controlled water supply to the river of an estimated 4,500 acre feet per annum. The factors affecting the dependability and continuance of this supply will be hereinafter discussed.

The river basin formation starts at a point not far south of the International Boundary and broadens into a valley that passes through Mexican territory, thence into the United States, and thence in a general northwesterly direction for about six miles, terminating at the Pacific Ocean. It is an alluvial fill from one to one and a half miles wide, bounded on the north and south by mesas rising above the valley floor.

Plaintiffs are the owners of lands overlying that portion of the underground basin in the United States, and they obtain water by pumping from individual wells located throughout the valley. The lands are devoted largely to agricultural, orchard, vineyard, and residence use. Defendant company, the successor of Coronado Water Company, also owns lands and wells in the valley. In June, 1936, plaintiffs filed their original, and in December, 1939, their final amended and supplemental complaint herein. They alleged their paramount right to waters of the basin for reasonable, beneficial needs, and charged that defendant was engaged in the construction of a large pipe line to convey water pumped from the basin to points without the watershed. They asserted that after removal of the large quantity of water which defendant proposed to export, there would not remain in the basin a sufficient supply for their use, and that the underground water level would be so lowered that the water in their wells would become salty, alkaline, brackish, and unfit for either domestic or agricultural use. They prayed for a declaration of their paramount right; that defendant be enjoined from asserting any interest adverse thereto, and from exporting water to points without the watershed; for such further relief as might be meet and equitable; and for costs.

Defendant answered setting up permits issued in 1924 and 1932 by the Division of Water Rights or its successor, the Division of Water Resources, allowing it to export, subject to prior rights, 3,200 acre feet of water annually, and asserting that such removal could be effected without undue drain upon or damage to plaintiffs' supply. Defendant also filed a cross-complaint against plaintiffs and, presumably, all other riparian and appropriative owners of waters of the basin and the holders of liens on many of the riparian lands, seeking not only a determination of the interests of the various cross-defendants, but also to have the trial court make reasonable regulations for the use of the waters with retention of jurisdiction to modify its decree as occasion might demand, and other meet and equitable relief.

Trial of the cause was commenced in November, 1940, and consumed a period of five months. Expert witnesses were called by both sides and most of the evidence was of a highly technical nature, requiring specialized knowledge in various fields of study for complete comprehension. Crop and soil surveys, and the character, acreage, and type of use of each parcel of land in the valley were analyzed. Well log data information relative to pumping methods, and costs, and the effect on the underground supply, as well as opinions on the quantity, quality and mineral content of water in various portions of the valley were received in evidence. Reports were submitted bearing upon the character of the underground formation, its relative permeability, its capacity as a storage reservoir, the direction, quantity, and rate of the underground flow, and factors relative to the danger of salt water intrusion. The effect of the upstream dam construction and of the past, present, and possible future methods of use of the water in Mexico were also considered.

Confronted with a mass of technical and conflicting evidence, the court took the case under submission at the close of the trial in April, 1941. A supplemental hearing was had in January, 1942, at which evidence was received of another year's record of conditions in the Tia Juana Valley. In June, 1942, the court filed an exhaustive memorandum opinion; in November, 1942, it denied a motion for reference to the Division of Water Resources, but received some additional evidence; and in December, 1942, findings of fact, conclusions of law and judgment were filed.

Among other things the court found the amount of acreage owned by the individual plaintiffs and appearing cross-defendants, and the amount of water reasonably required for present and possible future beneficial use for each parcel of overlying land. It found that there were not more than 21,000 acre feet of water then in the sands of the basin, available for economic use; that without storage of some part of the surface flow which wastes into the ocean, the annual safe net yield of the river and the basin within the boundaries of the United States is less than 6,000 acre feet per annum; that "at the present time at least 7000 acre feet of water per annum consumptive use are necessary for the reasonable and beneficial purposes of all lands having a right to the use of such water, and that in the future at least 7500 acre feet per annum, consumptive use will be so required."

The court found that the full safe net yield of water is required for reasonable, beneficial use on overlying lands and that after application of the waters of the basin to satisfy the individual needs under paramount rights, there remains no safe or dependable surplus available for exportation; that the only water not reasonably required under paramount rights for overlying lands is that part of the surface flow which reaches the ocean, or would reach it if not diverted by defendant; that if defendant were allowed indefinitely to continue pumping, the water level in the individual wells would be lowered unreasonably and the owners would have a substantial increase in their pumping costs; that defendant's pumping so far has not increased the salinity of the water, and there has been no substantial intrusion of sea water; but that there are physical factors showing that pumping by defendant in periods of drought would materially increase the salt water hazard.

The court found that a physical solution proposed by defendant was unworkable, and also that the long established proctice in the valley of obtaining water by the operation of individual wells is increasingly unsatisfactory and not conducive to putting to beneficial use to the fullest extent the resources of the basin; that to use the surface and underground flows to the fullest extent of which they are capable requires nothing less than a unified control of the entire water supply of the region, either by some public agency or some private agency operating as a public utility, and by an abandonment of the present system of pumping, together with the substitution of a relatively few pumping plants controlled by a unified agency and a comprehensive distributing system; also a system of artificial storage whereby in flood seasons water in excess of the storage capacity of the valley fill may be impounded for use in drier years; that pending the accomplishment of unified control, the present system of individual ownership and pumping is the only feasible manner of maintaining the population and continued use of the lands for residential and agricultural purposes. Under a unified control and distribution, the court found, there would be, except in years of subnormal runoff, excess water over and above the amounts necessary to satisfy rights paramount to defendant's right to export.

The judgment declares the extent of the paramount right of plaintiffs and appearing cross-defendants to water for their respective parcels of land, and also the extent of defendant's riparian right. As to defendant's appropriative right, it decrees that defendant is not entitled to take any water from the basin for exportation, except such water as is not reasonably required by those having paramount rights, the amount which defendant may export being fixed at 1100 acre feet for the year 1942, 1100 acre feet for 1943, and 550 acre feet for 1944, with not more than 1.53 million gallons being diverted in any one day. It is provided that after December 31, 1944, except in the event of modification of the judgment upon application made prior to that date, defendant shall not divert or export any water whatever from the underground basin, but that defendant is and shall be entitled to divert and export any surface flow of the river which would otherwise waste into the ocean.

Defendant appealed from this decree and moved for a new trial. In January, 1943, the motion for a new trial was denied and in December, 1943, a motion for modification of the judgment was likewise denied and defendant appealed separately from the order of denial. See Allen v. California Water & Tel. Co., Cal.Sup., 176 P.2d 24. On the present appeal from the decree defendant challenges the sufficiency of the evidence to support many of the findings, particularly those bearing upon the net safe yield of the basin and the non-existence of surplus water for exportation. Complaint is also made of the granting of injunctive relief; numerous incidental points are argued; the necessity for a physical solution is stressed; and complaint is made of the trial court's refusal to order a reference to the Division of Water Resources.

Among the many factors to be considered in computing the net safe yield of the basin are available sources of supply, dependability of annual replenishment, storage capacity of the underground reservoir, extent to which the water table may safely be lowered, danger of salt water intrusion, and the like. On these subjects the plaintiffs' witnesses drew conclusions from the physical facts different from those of the defendant's witnesses.

The variable character of the annual supply from rainfall and other natural sources, due to intermittent periods of drought, normality, and over-abundance, and the absence of records for more than relatively few years, has already been mentioned, as has also the development in late years of a flow resulting from the Mexican Rodriguez project. The surface flow at a point about two and one-half miles from the ocean, for the years in which any accurate records are available, has varied from none or one or two months of runoff, and from no surface flow or only 300 to 400 acre feet, to years with as high as four or five months of runoff and a surface flow of 240,000 to 250,000 acre feet. In the record 1940–1941 season there were ten months of runoff, with a flow of 334,849 acre feet.

In estimating the dependable annual yield of ground water from the valley in the United States, plaintiffs' expert witness, Charles H. Lee, considered the necessity of retaining sufficient water in the basin to tide over a reasonably anticipated period of three successive years of drought without replenishment from natural sources, and fixed the estimated dependable yield at less than 4,000 acre feet per annum. Defendant's expert witness, Edward R. Bowen, expressed the view that it is unwise to use a period of three successive years of no replenishment whatsoever as a criterion upon which to limit the use of a water supply because this results in a waste of water in years of normal or abundant replenishment. He concluded that defendant could divert 3,200 acre feet seasonally of ground water without unreasonably lowering the water table or endangering the supply for overlying lands. The trial court found the estimated net safe yield to be less than 6,000 acre feet per annum.

The question arose whether the estimated increment of 4,500 acre feet per annum from the Mexican project should be considered as a safe, established, and dependable source of annual replenishment of that portion of the basin in the United States. The trial court refused to consider this supply as dependable for two reasons: First, it concluded that the construction in Mexico was of such recent origin that the annual future yield could not be safely estimated with sufficient certainty to form the basis of a judgment permitting the future removal from the basin of water finding its origin in that source. What the effect of a series of dry years and the lowering of the level of the water behind the Rodriguez Dam would have on the leakage through the canyon wall could not be determined from any past experience. A lowering of the water level behind the dam, reducing the water pressure against the canyon wall, might result in decreased leakage. Second, the waters, before crossing the International Boundary, are entirely within the Republic of Mexico, which, in the absence of a treaty, may reclaim them or prevent their entry into this country. Of course, the latter reason may as soundly be applied to the status of all waters in the main stream crossing the International Boundary, for in the absence of treaty all are equally subject to interruption and appropriation in entirety in Mexico. Thus doubt is cast upon the dependability and continuance of the full flow across the border, regardless of whether it represents augmentation by the Rodriguez project, and sound argument is presented for retention of jurisdiction in the trial court for further action as occasion may require.

The underground basin was originally formed by erosion, and gradually filled with gravel, boulders, silt, clay, sand, and less permeable materials in the mesas bordering the two sides. The surface of the valley fill slopes westerly from the International Boundary to the sea, with the westerly limits broken by salt water sloughs. The underground formations vary in permeability, in absorptive quality, and in their ability to yield water. Various theories were expounded by the expert witnesses in explaining the bases for their respective estimates of the storage capacity of the underground reservoir, and the danger of salt water intrusion through any lowering of the water level.

In estimating storage capacity, Mr. Bowen considered a depth of from 40 feet minimum to 135 feet maximum, not including the upper five feet, and applied a specific yield of 20 per cent to the total estimated volume of 251,300 acre feet of effective valley fill in the United States and Mexico. He thus estimated a water storage capacity of 50,260 acre feet, of which 43,260 acre feet are in the United States. Mr. Lee, on the other hand, explained that parts of the valley fill are not available for storage and extraction of water. He considered available storage to include only an average depth of 45 feet, being the distance from the water table level at maximum height, except flood, to the lowest point from which water might be extracted as a practical matter of operation. He estimated the net available storage capacity of the upper basin, without deduction against salt water intrusion, at 15,980 acre feet, and of the lower basin at 2,840 acre feet. To this combined net storage capacity he added the capacity of mesa formation buried beneath a thin sheet of modern alluvium, and reached a total of 20,620 acre feet.

Although the reservoir was likened to an underground lake, Mr. Lee described it as more like two underground basins separated by a constriction near the site of defendant's pumping plant formed by buried projections into the valley of the relatively impermeable mesa formation. The normal percolation of water in the basin is westerly toward the ocean but there is also lateral percolation from the margins, and the possibility under certain conditions of a reversal of flow. Mr. Lee stated his belief that the gravel strata extends to within a quarter of a mile of the ocean and that this strata, in which the wells terminate, is a continuous sheet, so that pumping at one point affects the pressure at other points. One of his conclusions is that pumping creates a cone of pressure depression in the gravel strata, so that the starting and stopping of pumps at defendant's plant causes a quick drop and rise of the water level in other wells penetrating the strata; that it also induces underdrainage, lowering the water level in wells throughout the area affected, and is a direct drain upon the supply. Defendant's witnesses differed in their acceptance of the cone of pressure depression theory and questioned some of Mr. Lee's conclusions based upon it.

Several of the property owners and tenants testified that their wells, which formerly produced fresh usable water, had become alkaline after defendant's pumping operations started, and that the amount of water obtained by pumping had so decreased as to seriously extend the hours of pumping and the labor and cost. There was also evidence that land near the ocean, which was formerly productive, had become impregnated with salt and its usefulness had been destroyed. The quality of the water as a whole is poor; the leaching out of salt very difficult. To what degree the deterioration, if any, in the water supply can be attributed to defendant's operations is a subject of uncertainty in the proof.

Mr. Lee concluded that pumping from defendant's wells with its present facilities had caused a lowering of the water level under adjacent privately owned lands, even during periods of strong flow in the river; that such pumping will tend to cause salty water to migrate to fresh water areas, and may cause a reversal of flow with intrusion of salt water from the ocean into the naturally fresh water areas of the valley fill. Defendant's witnesses offered other explanations of the mineralization of the water in plaintiffs' wells. In several of them there was found crenothrix, a clogging bacteria; in some there was said to be evidence of sewage. The return waters from Mexico were said to contain solids which it might take years of irrigation to eventually work out; return waters from use in the United States were also classified as poor in quality. The mesa formations were found to contain connate or ancient entrapped sea water, highly mineralized, and possibly drawn down by the lowering of the water level.

Defendant's witnesses also suggested the so-called Coronado theory of the existence of an impervious dyke or seal, creating an impermeable barrier near the ocean and causing water in the basin to stagnate. Under this theory it was said that the pumping out of the basin and refilling with fresh water of improved quality each year would be beneficial, as would defendant's treatment of the water to remove chemicals. One witness stated that sea water and stagnation might cooperate to form mineralization. Another witness for defendant frankly expressed his opinion that either there is no impermeable barrier which prevents the escape of water from the valley, or else the valley would long since have become a salt marsh.

Another suggestion advanced on behalf of defendant was that regardless of the existence of an impermeable dyke, continued pumping and a lowering of the water table would not be dangerous because of the slow movement of the water underground, found by the trial court to be 1½ to 5 feet a day, with great retardation near the ocean. With this retardation, defendant claimed, its pumping could not draw in salt water, or affect the level of the water table at other points in the valley. Mr. Lee, however, was of the opinion that the basin could not be theoretically separated into compartments so that operations and extraction of water at one point would not affect other localities; also the extraction of 3,200 acre feet per annum might increase the velocity of the underground flow.

One of the defendant's expert witnesses testified to the possible presence of an aquifer, that is a fresh water containing body of porous, permeable gravel or sand, extending from the valley out on to the continental shelf along the coast line. He stated that if such an aquifer exists, any reduction of the hydraulic head in the underground basin or lowering of the fresh water table would cause salt water to flow up the aquifer. This was said to possibly account for the presence of sea water in some of defendant's wells. Furthermore, salt water, because of its weight, will at times creep in along the bottom of a pervious formation, and pumping too deep in a fresh water well may produce salt water. There is also some lateral percolation from salt water sloughs.

The most plausible theory presented was that of the existence of a fresh water barrier near the ocean, that is, a fresh water table above sea level between the cone of depression and the sea itself, which prevents the intrusion of salt water. With the existence of such a barrier, salt water would be excluded, although a small amount might move in along the bottom of the formation. The term sea level is commonly used to denote the mean of all tides, and hence to preserve the barrier, the fresh water table must be maintained at a sufficient height above sea level to meet the threat of high tides. One witness for defendant expressed the view that if the water table were sufficiently lowered the fresh water divide would progress down stream until it disappeared in the ocean, and it could not then be said that there would be no danger of salt water intrusion. He conceded that inasmuch as the starting of the pumps creates a cone of depression, it would be a precautional measure to see that the wells are not lowered below sea level.

Under their several theories, defendant's witnesses reached the conclusion that the safe yield of the basin has not yet been approached; that no property owner has been deprived of water by defendant's pumping; that even after the surface flow in the river has ceased, defendant can still pump in excess of 3,000 acre feet per annum without injury to overlying owners, or unreasonable lowering of the water table; and that this pumping would affect a conservation of waters which otherwise waste into the ocean. To the contrary, plaintiffs' witness stated that the basin needs a 10 to 15 foot level over the salt water to maintain a sufficient column; that a lowering of the water table would bring in salt water and the owners would have to drill deeper. It was his opinion that when there is no flow at the ocean, the water table has not obtained its maximum height, nor has the basin been fully recharged, and that pumping by defendant should therefore be limited to periods of river flow when the basin is full, the surface flow is reaching the ocean, and the level in pilot wells is 10 feet above sea level, measured when all pumps are running. He would also allow direct diversion near the ocean.

In attacking the findings of the trial court bearing upon the sources of supply for the basin, the dependability of annual replenishment, storage capacity of the underground reservoir, extent to which the water table may safely be lowered, the danger of salt water intrusion, and the ultimate finding of a net safe yield of the basin of less than 6,000 acre feet per annum, with no surplus existent for exportation to points without the watershed, defendant admits that there is a direct conflict in the opinions and conclusions drawn from the physical facts by the respective expert witnesses. But defendant argues that this conflict is overcome by the physical facts themselves showing the actual and continued existence of a surplus during wet cycles and the continuance of the augmentation of flow to the extent of about 4,500 acre feet per annum from Mexican operations. Therefore, defendant contends that even if the trial court was justified in drafting its findings largely in accordance with the views expressed by plaintiffs' expert witness, Mr. Lee, nevertheless it should have made provision, by retention of jurisdiction, and if necessary, by reference to the Division of Water Resources, for the use of any surplus so long as it actually exists; that any other conclusion sanctions the waste of water in direct violation of the constitutional mandate (art. XIV, § 3), as interpreted in the leading cases. Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533; City of Lodi v. East Bay Mun. Util. Dist., 7 Cal.2d 316, 60 P.2d 439; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972, 1014; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5.

[1, 2] It is true that the burden of proving the existence of a surplus is on defendant (City of Lodi v. East Bay Mun. Util. Dist., supra, 7 Cal.2d 316, 339, 60 P.2d 439; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 535, 45 P.2d 972; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 381, 40 P.2d 486); that the trial court's findings have substantial evidentiary support in the testimony of Mr. Lee and other witnesses for plaintiffs; that the attacks made by defendant upon the testimony of Mr. Lee go only to its credibility and weight; and that these are matters committed to the trier of the facts for determination in the case of an expert as well as of lay testimony. State Comp. Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 184, 231 P. 996, and cases cited; 2 Cal. Jur. p. 930, § 546. But the existence of the

Mexican increment in the stream flow, temporarily at least, is an undisputed fact as is also the possibility that through treaty or passage of time the augmentation may become sufficiently dependable to be considered in computing the net safe yield of the basin and adjudging whether there exists a surplus water supply available for exportation. Therefore, the findings of the trial court bearing on the subject of net safe yield and existence of a surplus must be limited in their effect to the conditions shown to exist in the basin at the time of trial and provision should be made to permit the taking of further evidence under retained jurisdiction and amendment of the findings and conclusions to conform to changing conditions. Under such retained jurisdiction provision may be made for the use of any current surplus over current need. These additional proceedings seem appropriate because of the factors which led the trial court to permit defendant to export 1,100 acre feet of water in each of the years 1942 and 1943, and 550 acre feet on 1944, namely, such factors as wet cycles, Mexican augmentation, and the urgent need of water for domestic use in outside areas due to extensive growth of population.

[3] The Mexican waters are not, as plaintiffs suggest, mere "waste" or "foreign" waters, but are portions of the natural flow of the stream which, after interruption by storage and irrigation use, find their way back into the surface and underground channel of the river, and flow over the International Boundary, and thence to the sea. Upon entering the United States they are subject to appropriation under the laws of this state just as any other waters of the state. Crane v. Stevinson, 5 Cal.2d 387, 394, 395, 54 P.2d 1100.

[4] Defendant concedes that plaintiffs' rights are paramount to its right of diversion and exportation of water, but contends that the amount of water claimed by plaintiffs and allowed them is exorbitant. It is argued that some of the lands which have been awarded water do not overlie the basin and are useless commercially because of salt marsh or alkali, and that the trial court erred in not differentiating between the plaintiffs and appearing cross-defendants whose lands are so located that they cannot be injured by defendant's operations and those whose lands are subject to injury. This argument would carry more weight if the existence of an impervious dyke or fresh water barrier had been established at any definite location along the coast east of any of the overlying lands. But other than in the realm of theory or speculation there is no showing that the underground waters are not so interconnected that damage from defendant's operations through lowering of the water level and percolation of salt or connate water is an existing hazard to all overlying owners. Defendant did not conclusively show that there were any areas which would not be affected by its pumping operations through pressure shock or mineralization, and plaintiffs' witnesses concluded that the hazard existed as to all of the overlying lands.

Although some lands may overlie clay deposits in the valley fill which are not water bearing, it was not shown that any overlying owner could not get usable water on some portion of this tract. The evidence affords sufficient support for the findings on this subject and also for the conclusion that the water allowances made are not unreasonable or excessive. Complaint is made of an error of description with respect to the Clark lands, and of ownership of the Holderness lands. No objection is interposed to a correction of the findings in these particulars. Such correction, it is assumed, may be made without a modification by this court.

[5, 6] In further attacking the trial court's allowance of water for reasonable, beneficial use, defendant argues that although any arable land, susceptible to irrigation, may be made productive, plaintiffs cannot be expected to plant all overlying lands to crops of high water consuming content, nor can they object to a lowering of the water level below the roots of the larger native brush, thus preventing the considerable loss of water from consumption by such growth. But the constitutional enjoinder against waste does not mean that the riparian owner must either clear all water consuming native growth from

his land or else permit a lowering of the underlying water table below the roots even if such lowering is otherwise inadvisable. Water rights are fixed without deduction for inevitable loss through evaporation or consumption by native brush. Neither is an overlying owner, considering the varying toleration of vegetation to salinity, limited to raising only such crops as have a high degree of tolerance. It should be assumed that he has made utility the primary consideration in farming his land and he is entitled to sufficient water for such crops as may normally be raised under conditions of noninfringement of his water supply.

[7, 8] Where owners overlying an underground basin have for many years developed their supply by individual pumping from shallow wells, and such method of use is not unreasonable under the circumstances shown, they are not required to centralize, localize, or scatter their pumping, or to unduly deepen their wells, or to undertake any other operations entailing a substantial increase of cost merely to enhance the surplus for the exporter. The overlying owner "Is entitled to make a reasonable use of the water according to the custom of the locality, and, as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system." Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 45 P.2d 972, 1010; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 23, 276 P. 1017, and cases cited.

[9] Defendant contends that the trial court erred in treating the basin as a unit, in taking into consideration and calculating the requirements of all overlying owners, and in issuing a general or blanket injunction. All that is required, defendant urges, is the declaration and protection of the paramount rights of the plaintiffs and the appearing cross-defendants, leaving any water remaining over paramount needs for use under subordinate rights. Meridian, Ltd. v. City and County of San Francisco, supra, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105; City of Lodi v. East Bay Mun. Util. Dist., supra, 7 Cal.2d 316, 60 P.2d 439.

But defendant, in its pleadings, and especially in its cross-complaint, put in issue the right of all overlying owners, and it was the theory at the trial, which will be adhered to on appeal (Marra v. Aetna Const. Co., 15 Cal.2d 375, 379, 101 P.2d 490; Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715; White v. City of San Diego, 126 Cal.App. 501, 507, 14 P.2d 1062, that the total draught on the basin was to be considered, for without such consideration there could be no physical solution or safeguard against salt water intrusion. Moreover, defendant persistently sought a reference for the purpose of establishing a physical solution and in its brief repeatedly states that it only wants such surplus waters as may be taken, whether more or less than 3,200 acre feet per annum, without endangering the supply for overlying lands and the quality of the water in the basin as a whole. For determination of these issues the full overlying need must be taken into consideration.

[10, 11] Some of the cross-defendants answered, but others did not appear. We are pointed to no proof of service upon any of them and no defaults were entered. It is stated in the briefs that defendant filed with the clerk of the court a voluntary dismissal of the cross-complaint as against all nonappearing cross-defendants. Plaintiffs assert, without citing any transcript reference, that this dismissal was filed on July 13, 1942, after the conclusions of the trial judge were announced and before the entry of formal findings and judgment; that therefore it was not effective under the provisions of section 581 of the Code of Civil Procedure. See Jalof v. Robbins, 19 Cal.2d 233, 120 P.2d 19; MacDermot v. Grant, 181 Cal. 332, 184 P. 396. However, both findings and judgment recite the dismissal of the cross-complaint against numerous cross-defendants, presumably all who did not appear, and it must be assumed, there being no showing to the contrary, that all proceedings leading to the judgment were correctly pursued, and that the

cross-complaint was regularly dismissed against the cross-defendants named in the recitals of the judgment to that effect. Estate of Hart, 11 Cal.2d 89, 77 P.2d 1082.

The individual water rights declared by the judgment run only in favor of the plaintiffs and appearing cross-defendants and some of the findings are similarly restricted. The overlying owners who were not parties to the action at the time of entry of the judgment are not bound by it, nor does it specifically run in their favor, although it may be inferentially favorable to them in its protection of the supply as a whole. But the priority of their rights is not here litigated.

[12] If no issue had been raised with respect to the danger of salt water intrusion, the trial court might have declared merely the extent of the water right of those overlying owners who appeared and litigated their claims, and limited its injunctive order to the infringement of that supply leaving the surplus remaining after satisfaction of prior rights for exportation or other use under subordinate and inferior rights. If no surplus had been shown over the needs of appearing owners, a collective declaration and permanent injunction against exportation would have been proper as in the case of Corona Foothill Lemon Co. v. Lillibridge, 8 Cal.2d 522, 66 P.2d 443. But here the salt water intrusion issue was raised, and under the general finding of a net safe yield of the basin of less than the present and prospective need for overlying lands, together with evidence that despite the present water supply there is danger of permanent injury through mineralization and salt water intrusion, plaintiffs and the appearing cross-defendants were entitled to relief which (1) would protect them to the extent of their individually declared rights (Meridian, Ltd. v. City and County of San Francisco, supra, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105), and (2) would also protect them, pending a physical solution of the water problem, against any exportation of water which would unduly increase their cost of use or lower the underground water level below the danger point.

[13] Defendant contends, however, that even if such relief be deemed proper, the injunctive provision of the decree entered by the trial court is ambiguous and that it is too restrictive, particularly when coupled with the absence of any provision for retention of jurisdiction after December 31, 1944. This contention must be sustained. Paragraph III of the decree provides that after December 31, 1944 (unless the decree be modified on application made before that date, which was not done), the defendant "shall divert and export no water whatever from the underground basin" but that the defendant "is and shall be entitled to divert, take and export any surface flow of the Tia Juana River which otherwise would waste into the ocean." But in paragraph IV of the decree it is provided that after December 31, 1944 (unless the decree be likewise modified, which was not done), the defendant "is wholly enjoined and restrained from diverting and exporting any water from said basin." So long as a considerable surplus flow exists in the valley, even though it is subject to interruption or cessation, its use for proper purposes should be permitted. The provision in paragraph IV of the decree prohibiting the defendant from exporting *any* waters from the basin is too prohibitive and is inconsistent with the provisions of paragraph III allowing the defendant to export surface flow which would otherwise waste into the ocean. Even the latter provision is not broad enough to accomplish that result. There should be a provision in the decree, until further order of the court under a retained jurisdiction, permitting the defendant as during the years 1942, 1943 and 1944, to operate its pumping plants and pump water from its wells on its land and to export that water for the use of its customers when surface waters are flowing in the Tia Juana River, which surface waters, if not intercepted by such pumping operations would waste into the ocean.

Difficulties in the formulation of a decree which will protect the supply and at the same time prevent the waste of surplus water may be experienced, but they should not be deemed unsurmountable. Defendant presented what it considered a physical solution for the control of its diversion upon the basis of the showing made by a proposed series of test wells, and it agreed to pay for any deepening of plaintiffs' wells or replacement of equipment necessitated by its draught on the basin. There was evidence to the effect that this solution was unworkable and the trial court rejected it. The trial court found that "* * * there is no physical solution which would meet the situation and at the same time permit the defendant * * * without injury to the plaintiffs and the cross-defendants here appearing to permanently export water from the Tia Juana River Valley in excess of the run-off that would otherwise waste into the ocean, *except* the solution hereinbefore in Finding XVII mentioned, to wit, that there be a single over-all agency, either public or private, with unified control and administration of the entire underground and surface flow of the Tia Juana River and Tia Juana River basin from the International Boundary Line to the ocean, together with the construction of a comprehensive distributing system * * * and the construction of such an artificial storage system as would permit the impounding of additional water in flood years for use in other years."

The trial court further found "That owing to present war conditions, and the consequent congestion of population in San Diego County, of which the Court takes judicial notice, and to avoid the risk of accentuating any shortage of water for the supply of such population, and in view of the impracticability in the present war conditions of immediately effecting the desirable unified control of the water supply of said Tia Juana River Valley or of immediately installing the needed comprehensive distributing system or further storage facilities therein, and having in view the present relatively high degree of impregnation of the valley fill of the Tia Juana River Valley, in consequence of the recent, though not indefinitely dependable, addition to the summer underflow of said river across the International Boundary Line, resulting from seepage and the return flow from irrigation from the Rodriguez Dam * * * it is reasonable to permit * * *" the defendant to continue to pump from the underground waters and to export the amounts of water hereinbefore set forth for the years 1942, 1943, and 1944.

The findings indicate that the trial court felt that the only solution feasible at the time of trial, was the plan whereby defendant could pump for exportation only when there was a surface flow into the ocean. They also indicate that the court did not include the Mexican increment in its determination of the water "yield" of the Tia Juana River watershed. The court found the Mexican increment too undependable to consider in arriving at a permanent solution and expressly considered it only in granting the defendant permission to pump water during the period of retention of jurisdiction. In restricting this pumping to the period up to December, 1944, the court found that the permission granted to defendant to pump "water in excess of that which would otherwise waste into the Pacific Ocean is in its nature temporary, and available only by reason of said heavy impoundment of water in said Rodriguez Dam and of the circumstances that seepage therefrom and return waters from irrigation therefrom in Mexico have not hitherto been intercepted by pumping or otherwise South of the International Boundary Line." If during this period the underground water level was sufficiently supported with water from the Mexican Project so that defendant could pump more water than would normally be allowed under the court's injunction, there is reason to believe that as long as that source of water remains available there may be a surplus for exportation.

[14, 15] By retaining jurisdiction to consider the effect of this added source of water and its dependability for the purpose of working out a solution, the court will be carrying out the policy inherent in the water law of this state to utilize all water available. Rancho Santa Margarita v. Vail, supra, 11 Cal.2d 501, 560, 81 P.2d 533; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 368, 40 P.2d 486; see 22 Cal.L.Rev. 333, 341; 23 Cal.L.Rev. 540. Even though the Mexican increment may be an undependable source of water, this water should not remain unused so long as it is available. In order to provide for the full utilization of this water, the trial court has the power to consider this source of supply so long as it is available. Rancho Santa Margarita v.

Vail, supra, 11 Cal.2d 501, 559, 81 P.2d 533; City of Lodi v. East Bay Mun. Util. Dist., supra, 7 Cal.2d 316, 337–341, 60 P.2d 439; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 574, 45 P.2d 972; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 383, 40 P.2d 486.

[16, 17] From the inception of this case defendant has pleaded for a reference to the Division of Water Resources. The motion was first presented in September, 1937, two years before the filing of the plaintiffs' amended and supplemental complaint. It was opposed by plaintiffs on the ground that it would amount to the retrial of an issue already decided adversely to them by issuance of the appropriation permits to defendant. But the issuance of the permits was not in any sense binding on the plaintiffs. In fact the permits expressly were granted subject to prior rights. The request for a reference was renewed at the commencement of the trial at which time the trial judge expressed himself as "very much tempted to grant it." It was again renewed during the course of the trial, also during the period which elapsed between the filing of the court's memorandum opinion and the entry of judgment. It was once more presented on the argument on the motion made during the pendency of the appeal from the judgment, for modification thereof. No positive duty rests upon the court to refer such a problem to the Division of Water Resources (Water Commission Act, St.1913, p. 1027, § 24, superseded by Water Code, §§ 2000 et seq.; Fleming v. Bennett, 18 Cal.2d 518, 116 P.2d 442; Rancho Santa Margarita v. Vail, supra, 11 Cal.2d 501, 81 P.2d 533; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 575, 45 P.2d 972; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 40 P. 2d 486), but it may call upon that agency at any time for assistance.

The State, appearing as amicus curiae, asserts that "The Division of Water Resources has been intimately concerned with the problems of the Tia Juana River for over a quarter of a century and has for the past ten years supervised the extractions by its permittee, the appellant, under stringent terms and conditions imposed in its permit as a safeguard against injury to prior overlying right owners, including plaintiffs. The appellant bears the expense of the facilities to be maintained and the data to be furnished to the Division." The State further states that, in view of the fact that adequate consideration has not been given to the stream flow coming from Mexico, a physical solution is possible and that one may be available through the instrumentality of its Division of Water Resources. It is further suggested by counsel for the State that, instead of an absolute injunction in disregard of the effectiveness of that long continued supervision, a declaratory judgment would be proper, coupled with retained jurisdiction placing the state agency supervision under immediate jurisdiction of the trial court, thereby enabling that court promptly to use its injunctive process when or if needed to protect prior rights. The Water Code (§§ 4200, 4201) authorizes the payment by the State of one-half of the costs of services furnished by the Division and the defendant offered at oral argument and in its supplemental brief, to pay the other half.

[18] One other matter should be mentioned. The city of San Diego filed an amended answer to defendant's cross-complaint and also filed an amended cross-complaint seeking to quiet its title as against defendant, to 420 acre feet of water per annum allegedly necessary for the irrigation of 105 acres of riparian land owned by it. The trial court awarded the city 224.50 acre feet per annum. Defendant contends that the city is estopped from contesting its claim to waters of the basin because a resolution of the governing body of the city approved a contract settling a controversy with defendant's predecessor, contains the recital that defendant "will endeavor to develop an additional and independent supply of water to lessen the burden now resting on the City," and it was this endeavor that led to the Tia Juana development. See City of Coronado v. City of San Diego, 48 Cal.App.2d 160, 119 P.2d 359.

The recital in the resolution, however, does not create an estoppel here. It does not contain any representation, express or implied, that the city will not object to defendant's taking water from the Tia Juana River basin to which it is not entitled, to the damage of other owners. Prior to the filing of the briefs on this appeal the city, which had changed its legal staff, altered to some extent the position it had formerly taken. In its brief it states that it is interested in constructing a dam across Cottonwood Creek at the International Boundary and is negotiating with the Republic of Mexico relative to the matter; that if the judgment herein is res judicata and will foreclose it from asserting any right in connection with the Cottonwood Creek project, it sincerely believes that notwithstanding such fact, public policy and the public interest entitle it to proceed with its plan; but if, on the other hand, the judgment herein is not res judicata as to its right to continue with the proposed development, then it requests that the judgment be affirmed.

So far as the present record shows, the Cottonwood Creek project is only mentioned in passing. No matters concerning the construction of a dam or impounding of waters of that stream have been at issue or decided, and the record affords no basis upon which to pose an answer to the city's question of res judicata. However, it may be said that the city, the plaintiffs, and the other cross-defendants are not necessarily adversary parties in this action (Hardy v. Rosenthal, 2 Cal.App.2d 442, 38 P.2d 412), and the right to construct the proposed dam on Cottonwood Creek and to impound its water has not been here litigated between them.

No retrial is necessary with reference to the prior rights of the plaintiffs and appearing cross-defendants and their present reasonable requirements as established by the judgment. But further consideration should be given to the issues pertaining to the supply of water coming from Mexico which may be available for exportation after the plaintiffs' and appearing cross-defendants' reasonable requirements have been satisfied, and pertaining to a solution to the end that all of the waters of the basin, including those coming from Mexico, may be beneficially used.

On oral argument counsel for plaintiffs stated that he had no objection to incorporating in the decree a proper provision for continuing jurisdiction, and the decree should be modified in general as determined by the District Court of Appeal for the Fourth District (157 P.2d 663, 680).

It is ordered that the following paragraph, to be number VII A, be and the same is hereby added to the decree:

"Defendant and cross-complainant, California Water & Telephone Company may operate its pumping plants and pump water from its wells on its land in the Tia Juana Valley and export that water for use by its customers when surface river waters are flowing in the bed of the Tia Juana River and which surface waters, if not intercepted by such pumping operations, would waste into the ocean."

It is further ordered that paragraph VIII of the decree be and it is hereby stricken and in lieu thereof the following is inserted:

"The court hereby reserves jurisdiction in this action over the parties and the subject matter so that on the application of any party hereto, or the successor in interest of any party, it may take new evidence on the amount of water seeping or released from the Rodriguez Dam and the amount of return waters from the Rodriguez Project reaching and crossing the line between Mexico and the United States either in the underground sands or by the surface flow of the Tia Juana River; also on the subject of any change in conditions of water supply in the portion of the Tia Juana Basin in the United States since the date of the judgment; and with the right to make modified or additional findings of fact and conclusions of law, and to modify the decree accordingly.

As so modified the decree is affirmed, no party to recover costs on appeal.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 878

Marvin L. ALLEN et al., Respondents, v. CALIFORNIA WATER & TELEPHONE COMPANY (a Corporation), Appellant.

L. A. 18960.

Supreme Court of California, in Bank.

Dec. 19, 1946.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Prior opinion, 157 P.2d 680.

Bacigalupi, Elkus & Salinger, of San Francisco, Philip Storer Thacher, of San Diego, and Charles DeY. Elkus, of San Francisco, for appellant.

J. F. DuPaul, City Atty., Phil D. Swing, Charles C. Crouch and Shelley J. Higgins, all of San Diego, for respondents.

PER CURIAM.

This is an appeal from an order made after judgment denying a motion for modification of the judgment. The appeal from the judgment has been this day decided. Allen v. California Water & Telephone Co., Cal.Sup., 176 P.2d 8. The opinion and decision on that appeal renders unnecessary a consideration of the questions here presented.

This appeal is therefore dismissed.

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29 Cal.2d 294

Ex parte SEELEY.

Cr. 4654.

Supreme Court of California, in Bank.

Dec. 3, 1946.

1. Habeas corpus 🔑94

In determination of a proceeding in habeas corpus to secure petitioner's release from custody, Supreme Court is ordinarily concerned with an inquiry into jurisdiction of court in which petitioner was convicted.

2. Habeas corpus 🔑3, 4, 30(1)

Generally, a writ of habeas corpus may not be used to correct error nor be employed where there is a remedy by appeal or other direct attack, but, in exceptional cases, it may be used even though other remedies might have been available.

3. Habeas corpus 🔑85(1)

The words "subsequent proceedings", within statute making defendant's admission that he had suffered prior convictions alleged in support of charge seeking to have defendant adjudged to be an habitual criminal, unless withdrawn by consent of court, conclusive of fact of his having suffered such previous convictions in all subsequent proceedings, refer to proceedings in same action, including an appeal from judgment of conviction, but do not include an independent proceeding in habeas corpus. Pen.Code, §§ 644, 1025, 1484.

See Words and Phrases, Permanent Edition, for all other definitions of "Subsequent Proceedings".

4. Habeas corpus 🔑92(1)

In habeas corpus proceeding, the court may look beyond face of the record, and the inquiry may extend not only to power of trial court to hear and determine subject matter, but also its authority to act in a particular manner over person of the accused. Pen.Code, § 1484.

5. Criminal law 🔑997

A writ of error coram nobis has not been recognized in California as an appropriate remedy for an inquiry into asserted imposition of an excessive sentence.

6. Habeas corpus 🔑4

Courts in habeas corpus may inquire into merits of claim that trial court exceeded its power by imposing an excessive sentence upon petitioner even where question might have been determined on appeal from judgment of conviction. Pen.Code, § 1484.

7. Criminal law 🔑1202(6)

An adjudication of habitual criminal status is not a "judgment of conviction", but is, in effect, only an ancillary and severable determination of a fact pertinent to length of imprisonment, and right to parole, and hence such determination is not necessarily characterized by the high degree of finality of a judgment of conviction. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment of Conviction".

8. Criminal law ⚿1202(1)

In adjudicating defendant's status under habitual criminal statutes, it was not the crime which defendant might have committed in a sister state, but the crime of which he had been convicted therein that was determinative of his status, and the adjudicated elements of the offense must meet requirements of the California law. Pen.Code, §§ 644, 668.

9. Habeas corpus ⚿28

Petitioner could secure relief in habeas corpus from an erroneous adjudication of habitual criminal status if facts appearing, either from face of record or by satisfactory proof, showed as matter of law the prior conviction was of a crime which did not meet definition of an offense included in habitual criminal statute. Pen. Code, §§ 644, 668, 1484.

10. Habeas corpus ⚿85(1)

Petitioner seeking relief in habeas corpus from an alleged erroneous adjudication of habitual criminal status had burden of overcoming presumption of regularity which attached to judgment of trial court, by proof of facts sufficient to show that sentence imposed upon him was unauthorized and excessive. Pen.Code, §§ 644, 668, 1484.

11. Criminal law ⚿1202(1)

In order to establish prior conviction of a felony, the statutory requirements must be fulfilled and the prior convictions must be of felonies enumerated in habitual criminal statute or substantially identical thereto. Pen.Code, § 644.

12. Criminal law ⚿1202(1)

The conviction in Oregon of offense of larceny in a building was not comparable to any felony mentioned in habitual criminal statute and would not support an adjudication that defendant was habitual criminal by virtue of his admission of two prior convictions of a felony, including the offense committed in Oregon. Pen.Code, § 644; Code Or.1930, §§ 14-309, 14-311, 14-316.

13. Criminal law ⚿991(2)

Where a court has jurisdiction of person and of the crime, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to attack.

14. Habeas corpus ⚿109

Where petitioner seeking writ of habeas corpus showed that his sentence following his conviction of burglary of the first degree and adjudication that he was an habitual criminal was unauthorized to extent that he was adjudged an habitual criminal, and it appeared that no maximum punishment for first degree burglary was fixed in accordance with statute, petitioner was not entitled to his discharge, but proper course was for the constituted authority to refix petitioner's sentence. Pen. Code, §§ 461, 644.

SPENCE, EDMONDS, and TRAYNOR, JJ., dissenting in part.

◆

Proceeding in the matter of the petition of Hugh R. Seeley for a writ of habeas corpus to secure release from custody.

Writ discharged and petitioner remanded.

Hugh R. Seeley, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., and Arthur A. Ohnimus, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is a proceeding in habeas corpus. The petitioner is confined in the State Prison at Folsom under a judgment of conviction on his plea of guilty of the crime of burglary of the first degree and an adjudication that he is an habitual criminal by virtue of his admission of two prior convictions of a felony. The basis for his application for release from custody is his claim that one of the prior convictions did not constitute a felony for which he could be adjudged an habitual criminal and that his sentence is therefore excessive and void.

The petitioner was accused by information of the crime of burglary committed on March 10, 1938, in the city of Los Angeles. The information also alleged two prior convictions of felonies for which the petitioner had served terms. One was in the circuit court of Josephine County, Oregon, on December 9, 1932, which the information specified as a prior conviction of "Burglary, a felony." The petitioner pleaded guilty to the main charge, and admitted the prior convictions. The court found the burglary to be of the first degree, and also found that the petitioner was not armed with a deadly weapon at the time of the commission of the crime. He was adjudged to be an habitual criminal. Pen.Code, § 644. Judgment was entered accordingly and the petitioner was received at Folsom on June 1, 1938.

The problem is immediately presented as to the scope of the hearing and determination in this proceeding in view of the record of the trial in which petitioner was adjudged an habitual criminal.

[1, 2] In the determination of a proceeding in habeas corpus in this state the court is ordinarily concerned with an inquiry into the jurisdiction of the court in which the prisoner was convicted. It is the general rule that the writ may not be used to correct error nor be employed where there is a remedy by appeal or other direct attack. But in exceptional cases it may be issued even though other remedies might have been available. In re Belt, 159 U.S. 95, 100, 15 S.Ct. 987, 40 L.Ed. 88; In re Bell, 19 Cal.2d 488, 122 P.2d 22; In re Connor, 16 Cal.2d 701, 705, 712, 108 P.2d 10.

In Re Bell, supra, 19 Cal.2d at page 494, 122 P.2d at page 26, this court said: "There are other situations in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate. Thus, it lies to test whether there is probable cause to justify the committing magistrate in holding petitioner for trial. * * * There is no other method of securing a review of the magistrate's determination in this regard. * * * It also lies to test whether the complaint charges a public offense * * * even though this question falls within the jurisdiction of the trial court and may be raised on appeal. Certain courts go so far as to permit the use of habeas corpus before trial when the statute of limitations has run upon the offense charged * * *." In that case it was also held that it was not necessary to exhaust all available remedies by appeal before habeas corpus could be invoked to test the question of constitutionality.

[3] In the present case, in view of the record, there were no apparent grounds of appeal and an appeal would not have disclosed the alleged unlawful term of imprisonment of the petitioner. Furthermore, by section 1025 of the Penal Code, the defendant's admission that he has suffered the alleged prior convictions, unless withdrawn by consent of the court, is made conclusive of the fact of his having suffered such previous convictions "in all subsequent proceedings." But the words "subsequent proceedings" refer to proceedings in the same action, including an appeal from the judgment of conviction. That they do not include an independent proceeding in habeas corpus is indicated by the fact that the courts in numerous cases hereinafter cited have entertained the inquiry regardless of the fact that the defendant had admitted the prior conviction.

[4] The Legislature has provided by section 1484 of the Penal Code that a petitioner in a habeas corpus proceeding may "allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require * * *." In the Bell case, supra, 19 Cal.2d at page 501 et seq., 122 P.2d 22, following In re Connor, 15 Cal.2d 161, 164, 99 P.2d 248, and other

cases, and applying the foregoing provisions of the Penal Code, the court rejected the "all too broad" statement that the inquiry on habeas corpus is limited to an investigation on the face of the proceedings in the trial court. The established rule in this state was reiterated to the effect that in a habeas corpus proceeding the court may look beyond the face of the record. In Re Connor, supra, 16 Cal.2d at page 712, 108 P.2d 10, it was said that the scope of inquiry on habeas corpus in this state may, under exceptional circumstances, extend over the entire course of proceedings in the lower courts and may include additional evidence taken in the court entertaining the proceeding either directly or under an order of reference. The inquiry extends not only to the power of the trial court to hear and determine the subject matter, but also to its authority to act in a particular manner over the person of the accused. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411. In the latter case it was pointed out that such a course does not imply an abandonment of fundamental legal principles, but on the contrary, that it necessarily flows from constitutional requirements and long established rules.

[5-10] The courts have refused to recognize the remedy by writ of error coram nobis as appropriate for an inquiry into an asserted imposition of an excessive sentence. That writ has been denied as an alternative where the remedy by appeal existed. People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; People v. McVicker, 37 Cal.App.2d 470, 99 P.2d 1110; People v. McConnell, 20 Cal.App.2d 196, 66 P.2d 720; People v. Moore, 9 Cal.App.2d 251, 49 P.2d 615. In People v. Lumbley, 8 Cal.2d, at page 755, 68 P.2d 354, and People v. McVicker, 37 Cal.App.2d, at page 475, 99 P.2d 1110, it was indicated that habeas corpus is the proper proceeding to test the question whether the petitioner was serving an excessive sentence by virtue of an unauthorized adjudication that he was an habitual criminal. The respondent fails to cite a case, and we have discovered none, in which the court has refused to examine into the petitioner's claim that the trial court exceeded its power by imposing an excessive sentence, when that claim was presented in a habeas corpus proceeding. Courts have inquired into the merits of such a claim in habeas corpus even where the question might have been determined on an appeal from the judgment of conviction. See In re Gilliam, 26 Cal.2d 860, 161 P.2d 793; In re Brady, 5 Cal.2d 224, 53 P.2d 945; In re Morck, 180 Cal. 384, 181 P. 657; In re Howard, 69 Cal.App.2d 164, 158 P.2d 408; In re Connell, 68 Cal.App.2d 360, 156 P.2d 483; In re Taylor, 64 Cal.App.2d 47, 148 P.2d 143; In re Bertrand, 61 Cal.App.2d 183, 142 P.2d 351; People v. McVicker, supra, 37 Cal.App.2d 470, 474, 475, 99 P.2d 1110; In re Tartar, 1 Cal.App 2d 400, 36 P.2d 419; In re Miller, 133 Cal App. 228, 23 P.2d 1034; In re Bouchard, 38 Cal.App. 441, 176 P. 692. As more directly intimated in the Bell case, supra, 19 Cal.2d 488, at pages 503, 504, 122 P.2d 22, that inquiry is not only justified, but is made imperative by the provisions of section 1484 of the Penal Code which gives the court broad powers on the investigation of the legality of the restraint under which a prisoner is held, and precludes the court from refusing to dispose of the prisoner's rights as the justice of the case may require and particularly when it appears that the sentence for which he could lawfully be held is less than that actually imposed upon him. The most recent pronouncement of this court is contained in the opinion in Re McVickers, Cal.Sup., 176 P.2d 40, this day filed, the reasoning and conclusions of which are in harmony with those expressed herein. In that case it was held that an adjudication of habitual criminal status is not a judgment of conviction but is, in effect, only an ancillary and severable determination of a fact pertinent to the length of imprisonment and right to parole, and hence that such determination is not necessarily characterized by the high degree of finality of a judgment of conviction. It was also held in that case that it is not the crime which a defendant may have committed in a sister state, but the crime of which he has been convicted therein, that determines his status under section 644 and 668 of the Penal Code. The adjudicated elements of the offense must meet the requirements of the Cali-

fornia law. It follows from that case and other pertinent cases therein and herein cited that a petitioner may attack and secure relief in habeas corpus from an erroneous adjudication of habitual criminal status where the facts appearing, either from the face of the record or by satisfactory proof, show that as a matter of law the prior conviction is of a crime which does not meet the definition of an offense included in said section 644. We conclude that the court in this proceeding should inquire into the facts presented in arriving at a determination of the question whether the petitioner is being held under an excessive sentence, and therefore is, to that extent, illegally restrained of his liberty. But the petitioner must meet the burden of overcoming the presumption of regularity which attaches to the judgment of the trial court, by proof of facts sufficient to show that the sentence imposed upon him was unauthorized and excessive. In re Bell, supra, 19 Cal.2d 488, at page 500, 122 P.2d 22; In re Taylor, supra, 64 Cal.App.2d 47, at page 51, 148 P.2d 143.

[11] The court derives its power to adjudge a defendant an habitual criminal from the provisions of section 644 of the Penal Code. At the time of the petitioner's conviction that section included, among others, the crimes of robbery, burglary, and grand theft, two convictions of which, together with time served therefor, would subject an accused to an adjudication that he is an habitual criminal and to the increased punishment for the subsequent commission of a felony. Section 668 of the Penal Code brings within the purview of section 644 convictions in other states for crimes which, if committed within this state, would be punishable as felonies under the laws of this state. In People v. Dawson, 210 Cal. 366, 372, 292 P. 267, it was stated that in order to establish the prior conviction of a felony, the statutory requirements must be fulfilled. The prior convictions must be of felonies enumerated in section 644, or substantially identical thereto, in order to effect the purposes of that section. In re Howard, supra, 69 Cal.App.2d 164, 158 P.2d 408; In re Connell, supra, 68 Cal.App.2d 360, 156 P.2d 483; In re Taylor, supra, 64 Cal.App.2d 47, 50, 148 P.2d 143; People v. McChesney, 39 Cal.App.2d 36, 41, 102 P.2d 455; People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615; People v. Morrison, 26 Cal.App.2d 616, 80 P.2d 94; People v. McGee, 24 Cal.App.2d 391, 75 P.2d 533; People v. Shaw, 137 Cal.App. 533, 30 P.2d 1031.

In the Lohr case, supra, 28 Cal.App.2d at page 399, 82 P.2d at page 616, on appeal from a judgment of conviction it was said: "In order to adjudge a defendant an habitual criminal the test is not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of felonies enumerated in section 644 of the Penal Code." There the defendant admitted the prior convictions. In the Connell case, supra, 68 Cal.App.2d 360, 156 P.2d 483, the defendant pleaded guilty to the main charge and admitted two prior convictions. He was adjudged an habitual criminal and sentenced to life imprisonment. On habeas corpus he was discharged when investigation revealed that one of the prior convictions was of a crime in another state which was not within the purview of section 644, and that the petitioner had served, with the benefit of credits, the maximum term for which he should have been imprisoned on conviction of the main charge. In the Howard case, supra, 69 Cal.App.2d 164, 158 P.2d 408, a habeas corpus proceeding, the petitioner had been charged with prior convictions of two felonies, one in the State of New Mexico, which he admitted. He was adjudged an habitual criminal under section 644. It was conceded that the New Mexico conviction was for the theft of an overcoat and lumber jacket of the value of $45 and that this was not such a crime as would constitute a felony in this state or which was included within section 644 of the Penal Code. It was held that the trial court should not have considered the New Mexico conviction as bringing the petitioner within the provisions of section 644. The petitioner was released upon a showing that he had served the maximum term for which he should have been imprisoned.

[12] The question then is whether the crime of which the petitioner was convicted in Oregon is one upon which he could

be adjudged an habitual criminal under section 644 of the Penal Code.

It appears from the record before us that on October 21, 1932, the petitioner was arrested and held in jail at Grants Pass, Oregon, on a tentative charge of burglary in violation of section 14-309, Oregon Code. Official investigation disclosed that the entry of the building involved had not been with an intent to steal or commit a felony. The charge of burglary was accordingly withdrawn and in its place there was substituted the charge of Larceny in a Building, a violation of section 14-316, Oregon Code. The petitioner pleaded guilty to that charge in the Oregon court. He and two others also accused were found to have entered a Standard Oil Company warehouse and carried away thirty gallons of gasoline. He was sentenced and was confined in the penitentiary at Salem, Oregon, for an indeterminate period not to exceed eighteen months.

Larceny in a Building is defined by section 14-316 of the Oregon Code as follows: "If any person shall commit the crime of larceny in any dwelling house * * * or warehouse * * * or shall break and enter in the night or daytime any church * * * or other building erected or used for public uses, and commit the crime of larceny therein, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than seven years."

The crime, as so defined, is not expressly included in section 644 of the Penal Code. Furthermore, the larceny of thirty gallons of gasoline, being goods of a value less than $200, is not comparable to grand theft in this state (Pen.Code, § 487), nor is it robbery (Pen.Code, § 211). The respondent does not question that the conviction of Larceny in a Building is the prior conviction referred to in the information here involved. He contends, however, that the Oregon crime of Larceny in a Building is substantially identical to the crime of burglary which is defined in section 459 of the Penal Code as the entry of any house, warehouse, etc., with intent to commit grand or petit larceny or any felony. It is conceded that intent to steal or commit a felony, a necessary ingredient of the crime of burglary in this state, is not included in the definition of Larceny in a Building under the Oregon statute, but it is argued that it may be assumed to have been present by the act of "entering" the building. One difficulty with the respondent's position is that the uncontroverted showing in this proceeding is contrary to the assumption. The Oregon law (Oregon Code, § 14-311) defines burglary (other than in a dwelling house) as the breaking into and entering any "Other structure or erection in which any property is kept, with intent to steal therein, or to commit any felony therein." The punishment prescribed is "imprisonment in the penitentiary not less than two nor more than five years." Thus Oregon has a burglary statute containing a definition of burglary comparable to that in our Penal Code. But as stated, before judgment in Oregon the official investigation of the petitioner's conduct disclosed that there had been no violation of the burglary statute. On the showing in this proceeding it is clear that intent to steal or commit a felony was not inherent in the crime with which the petitioner was charged and of which he was convicted in Oregon. The intent in fact was not present. The crime of Larceny in a Building, as defined by the Oregon Code and as found by the court in Oregon to have been committed by the petitioner, is not a crime which would have been punishable as a felony in this state and is not comparable to any felony mentioned in section 644 of the Penal Code. The conviction of that crime was therefore not a legal basis for an adjudication that the petitioner was an habitual criminal. It follows that an excessive sentence was imposed upon the petitioner.

[13, 14] The petitioner has met the burden of showing that the sentence imposed on him was unauthorized in part and excessive; but it does not follow that he is entitled to his discharge. The rule is settled in this state in accord with the weight of authority that "where a court has jurisdiction of the person and of the crime, the imposition of a sentence in excess of what the law permits does not

render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. In other words, the sentence is legal in so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separate and may be dealt with without disturbing the valid portion of the sentence." 12 R.C.L. p. 1208. The rule is recognized and applied in In re Morck, supra, 180 Cal. 384, 181 P. 657, In re Howard, supra, 69 Cal.App.2d 164, 158 P.2d 408, and in other cases above cited. The rule in this state is also in accord with the text in 12 Ruling Case Law at page 1209 that, "Prior to the expiration of that part of the sentence that the court could legally impose, the prisoner will not, according to the prevailing rule, be discharged on habeas corpus, on the ground that the sentence is excessive. In re Rosencrantz, 211 Cal. 749, 752, 297 P. 15; Id., 205 Cal. 534, 541, 271 P. 902; In re Spaulding, 8 Cal.App.2d 497, 48 P.2d 133; In re Miller, supra, 133 Cal.App. 228, 23 P.2d 1034. No difficulty is likely to arise in ascertaining the lawful portion of the sentence which should have been imposed upon the petitioner. Section 461 of the Penal Code fixes the punishment for first degree burglary as imprisonment in the state prison for not less than five years. Since no maximum is there prescribed the petitioner has failed to show that he is entitled to his release at this time. The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this opinion.

The writ is discharged and the petitioner is remanded.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concurred.

SPENCE, Justice (concurring and dissenting).

I concur in the conclusion reached in the majority opinion that the writ should be discharged and that the petitioner should be remanded to custody. I dissent, however, from the implied conclusion there reached that the judgment adjudicating petitioner's status as an habitual criminal should be nullified in this proceeding on habeas corpus, and also from the express conclusion that "The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this [the majority] opinion." I am also in disagreement with much that is said in the majority opinion in reaching these last mentioned conclusions.

The majority opinion herein cites and relies upon the reasoning and conclusions in the majority opinion in Re McVickers, Cal.Sup., 176 P.2d 40, this day filed. In my dissent in the McVickers case I discussed to some extent the basic problem involved here, but indicated that I would more fully discuss that particular problem in my dissent in this case.

The basic problem here is that of the scope of review on habeas corpus in those cases where it is sought to use such proceeding for the purpose of nullifying a judgment in a criminal proceeding adjudicating the accused to be an habitual criminal. In such cases the attack on habeas corpus is upon the *validity* rather than upon the *effect* of such judgment. I believe that in such cases the scope of review extends only to the question of the jurisdiction of the trial court to make such habitual criminal adjudication; that the inquiry does not extend beyond the face of the record in the criminal proceeding in which such adjudication was made; and that if it does not affirmatively appear from the face of such record that the trial court was without jurisdiction to make such adjudication, then the habitual criminal adjudication should not be nullified. The majority opinion, however, holds that the scope of review is not confined in such cases to the question of the jurisdiction of the trial court to make such habitual criminal adjudication; that the inquiry is not confined to the face of the record in the criminal proceeding in which the adjudication was made; and that regardless of whether it may not affirmatively appear from the face of such record that the trial court was without jurisdiction, the court in which the habeas corpus proceeding is brought is not only under the duty to review the habitual criminal adjudication as extensively as an appellate court would review it on direct attack by way of appeal but is also under the duty to accept any evidence which may be presented for the purpose of examining anew, in the same manner as did the trial court in the first instance, the question of whether the petitioner is an habitual criminal within the meaning of our habitual criminal law. Pen.Code, § 644. The meaning of the word "jurisdiction," as above used, will be hereinafter discussed.

That the foregoing statements correctly reflect the views expressed in the majority opinion here as well as those expressed in the majority opinion in the McVickers case, there can be no doubt. In the majority opinion in the McVickers case it is said that on habeas corpus the court will "Inquire into questions of so-called 'mere error' going to the whole basis of the determination * * *," thereby indicating that the scope of review on habeas corpus is as extensive as that on direct attack by way of appeal. In the majority opinion herein, in view of the admission by petitioner in the trial court of the alleged prior conviction in Oregon of "Burglary, a felony" and in view of the admitted fact that the statutory definition of "burglary" in Oregon is substantially identical with the statutory definition in this state (Pen.Code, § 459), it is conceded that petitioner could not have been successful on direct attack by appeal as "there were no apparent grounds of appeal." But despite such admissions, the majority view is that the entire question may be examined anew on habeas corpus, disregarding the proceedings in the trial court in which the habitual criminal adjudication was initially made and considering evidence dehors the record therein, which evidence in this case consists merely of the allegations of petitioner concerning the claimed facts surrounding the commission of the prior offense and the prosecution therefor. Not a single authority is cited involving facts similar to those presented in this case, and I cannot join in the conclusions of the majority opinion herein involving, as they do, a revolutionary departure from accepted rules relating to the scope of review on habeas corpus without any good or sufficient reason being suggested for such departure.

Some of the problems arising under our habitual criminal law have been suggested in my dissent in the McVickers case. The problems presented are many, including those which confront the trial courts where the habitual criminal adjudications are initially sought; those which confront the appellate courts on direct attack on habitual criminal adjudications by way of appeal; those which confront the trial and appellate courts in proceedings by way of writ of error coram nobis, in which it is sought to nullify the habitual criminal adjudication; and those which confront the trial and appellate courts in proceedings on habeas corpus, in which it is sought either to nullify the habitual criminal adjudication or to limit its effect to an adjudication of habitual criminality based on two prior convictions only. It is therefore understandable, as expressed in the majority opinion in the McVickers case, that the courts have felt "somewhat uncertain"; and it is further understandable that some confusion is found in the authorities dealing with the review of judgments in which habitual criminal adjudications have been made, as well as in the authorities dealing with the review of judgments in which no such adjudications have been made but in which cases prior convictions have been alleged and admitted or found to have been suffered. This confusion appears to be due in a large measure to (1) the failure of the courts at times to clearly recognize the distinction between the scope of review on direct attack on appeal and the scope of review on collateral attack on habeas corpus or *coram nobis*, and (2) the further failure of the courts at times to clearly recognize the distinction between the scope of review on habeas corpus when the attack is made on the *validity* of the judgment and the scope of review when the attack is upon the *effect* rather than upon the *validity* of the judgment. The present case and other pending cases offer the opportunity for this court to make clear these distinctions, but it seems to me that the majority opinion herein and that in the McVickers case can serve only to perpetuate the existing confusion.

There is at present confusion in the authorities dealing with review of habitual criminal adjudications on direct attack by way of appeal (cf. People v. Shaw, 137 Cal.App. 533, 30 P.2d 1031, and People v. Hayes, 3 Cal.App.2d 59, 39 P.2d 213); and while the cases dealing with review by way of writ of error coram nobis appear quite consistent among themselves (see People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751; People v. McVicker, 37 Cal.App.2d 470, 99 P.2d 1110; People v. Lyle, 21 Cal.App.2d 132, 68 P.2d 378, People v. McConnell, 20 Cal.App.2d 196, 66 P.2d 720; People v. Moore, 9 Cal.App.2d 251, 49 P.2d 615), the language of the last-mentioned cases cannot be reconciled with the majority opinion herein or with certain other recent cases decided by the District Courts of Appeal and involving review by way of proceedings on habeas corpus (see In re Connell, 68 Cal.App.2d 360, 156 P.2d 483; In re Howard, 69 Cal.App.2d 164, 158 P.2d 408; In re Williams, 76 Cal.App.2d 161, 172 P.2d 558). As the attack on the *validity* of an habitual criminal adjudication is in the nature of a collateral attack in proceedings on habeas corpus as well as in proceedings by way of writ of error *coram nobis* (People v. Spivey, 25 Cal.App.2d 279, 77 P.2d 247), the scope of review in the former, in testing the *validity* of the judgment, should not be more extensive than the scope of review in the latter. I believe that the language employed by this court and other courts in cases dealing with the review of habitual criminal adjudications in proceedings by way of the writ of error coram nobis points to the correct rule in proceedings on habeas corpus, and that said rule should prevail over the rule, apparently adopted without adequate consideration, in recent habeas corpus cases decided in the District Courts of Appeal and cited above. If the correct rule is applied here, then petitioner is not entitled to any relief in this proceeding.

In order to understand the far-reaching effect of the majority opinion, it is necessary to keep clearly in mind (1) the facts disclosed by the record in the criminal proceeding in which petitioner was adjudicated to be an habitual criminal; (2) the claims made by petitioner in this habeas corpus proceeding; and (3) the precise question presented here.

The Facts Disclosed by the Record in the Criminal Proceeding.

Petitioner was charged in 1938 with the commission of a felony in this state and with two prior convictions as follows: (1) a prior conviction in Oregon in 1932 when he was alleged to have been "convicted of the crime of burglary, a felony" and (2) a prior conviction in California in 1928 when he was alleged to have been "convicted of the crimes of forgery and grand theft, felonies." No question is raised concerning the sufficiency of the pleading of the prior convictions as felonies specifically enumerated in section 644 of the Penal Code. Petitioner pleaded guilty to the primary offense and admitted the alleged prior convictions. The judgment of conviction recited the foregoing facts including his admission of the prior convictions "as alleged in the information" and adjudged that "said Hugh R. Seeley is an Habitual Criminal." He was sentenced to Folsom "for the term of his natural life." The judgment became final.

The Claims Made by Petitioner in This Habeas Corpus Proceeding.

In this proceeding instituted in 1945, Petitioner makes no claim that the trial court committed any error whatever in the criminal proceeding. His sole claim is that he made an error in that he should not have admitted the alleged prior conviction in Oregon of "burglary." As the basis for this claim, he sets forth what purports to be certain evidence, not found in the record in the criminal proceeding in which he was adjudicated to be an habitual criminal, purporting to show that he was in fact convicted of the crime of "larceny in a building" rather than "burglary," and purporting to show further that the actual offense which he committed would not have constituted "burglary" as defined in this state. Pen. Code, § 459. Upon this showing by evidence dehors the record in the criminal proceeding in this state, petitioner seeks to have this court nullify that portion of the judgment adjudging him to be an habitual criminal, upon the grounds that the trial court "was without jurisdiction to invoke the statute (Pen. Code, § 644) against petitioner," and "that the said judgment, so rendered without jurisdiction as aforesaid, is illegal, unlawful, null, and void."

The Question Presented.

The real question presented is therefore as follows: "On this review on habeas corpus, brought for the purpose of nullifying the final judgment adjudicating petitioner to be an habitual criminal, does the scope of review extend beyond an inquiry into the jurisdiction of the trial court to make such adjudication, as disclosed by the face of the record in the criminal proceeding in which such adjudication was made, and permit petitioner to impeach the final judgment by evidence dehors the record in the criminal proceeding?"

In my opinion, the answer to this question should be in the negative, which answer is in line with the authorities in this state and elsewhere dealing with the traditional scope of review on habeas corpus.

The Traditional Scope of Review on Habeas Corpus.

It must be borne in mind at all times that there is involved in this proceeding a collateral attack upon a final judgment. In the early case of Ex parte Max, 44 Cal. 579, at page 581, this court referred to the "obvious distinction between the office of a writ of error or an appeal, on the one hand, and a writ of habeas corpus upon the other," and held that mere error could not be reviewed in the latter. This distinction has been frequently pointed out in the more recent decisions. In re Connor, 16 Cal.2d 701, 108 P.2d 10; In re Selowsky, 189 Cal. 331, 208 P. 99; In re Drew, 188 Cal. 717, 207 P. 249; In re Valterza, 37 Cal.App.2d 682, 100 P.2d 337; In re Koester, 56 Cal. App. 621, 206 P. 116; 13 Cal.Jur. 223. Because of this fundamental distinction, it has been quite widely and uniformly held that if a trial court has jurisdiction its determination of the question whether an offense charged constituted a subsequent offense, which called for a penalty more severe that could be imposed for a first offense, cannot be attacked in a habeas corpus proceeding brought to obtain discharge from imprisonment under the sentence imposed, notwithstanding the fact that it might appear that the determination made was erroneous. See 25 Am.Jur., Habeas Corpus, § 59, p. 188; Ex parte Belt, 159 U.S. 95, 15 S.Ct. 987, 40 L.Ed. 88; United States ex rel. Mason v. Hunt, D.C. 16 F. Supp. 285; Goodman v. Daly, 201 Ind. 332, 165 N.E. 906; Ex parte Elicker, 117 Ohio St. 500, 159 N.E. 478; Thompson v. Harris, 107 Utah 99, 152 P.2d 91, certiorari denied 324 U.S. 845, 65 S.Ct. 676, 89 L.Ed. 1406; Ex parte Brazel, 293 Mich. 632, 292 N.W. 664; People ex rel. Garrison v. Wilson, 176 Misc. 1040, 29 N.Y.S.2d 811; Mason v. Corrigan, 161 Misc. 93, 289 N.Y.S. 1003.

The foregoing authorities, and many others which might be cited, show that the traditional function of the writ of habeas corpus, when used for the purpose of attacking a final judgment, is solely to determine the jurisdiction of the trial court to enter the particular judgment under attack. It is also clear that the question of jurisdiction must ordinarily be determined from the face of the record in the action in which the judgment was entered, and that no evidence dehors that record may be received in the habeas corpus proceeding for the purpose of impeaching the judgment. In re Selowsky, supra, 189 Cal. 331, 208 P. 99; In re Stevenson, 187 Cal. 773, 204 P. 216; In re Mirando, 15 Cal.App.2d 443, 59 P.2d 544.

The majority opinion recognizes that on habeas corpus "the court is ordinarily concerned with an inquiry into the jurisdiction of the court in which the prisoner was convicted" and that if the traditional scope of review on habeas corpus is to be observed in this proceeding, petitioner is not entitled to relief. It nevertheless grants relief, for the result of the majority opinion is to nullify the portion of the judgment by which petitioner was adjudged to be an habitual criminal. This result is reached despite the fact that the jurisdiction of the trial court was admittedly shown by the record in the criminal case and despite the fact that there was admittedly no error whatever on the part of the trial court in making the habitual criminal adjudication.

On the contrary, it was the clear duty of the trial court, upon the record in that case, to make such adjudication. Pen.Code, § 644.

The Theory of the Majority Opinion.

It is difficult to determine the theory of the majority opinion. It seems to proceed first upon the theory that this is one of those "exceptional cases" which justifies a total departure from the well-established rules governing the scope of review on habeas corpus. It then intermingles this theory with the further theory that the situation presented is merely one of excessive sentence which may be corrected on habeas corpus.

In a further attempt to sustain the result reached, passing reference is made to section 1025 of the Penal Code, which makes petitioner's admission of the prior conviction "conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings" but it is declared, without the citation of any authority, that the term "subsequent proceedings" does not include proceedings on habeas corpus.

Further reference is made to section 1484 of the Penal Code which permits a petitioner on habeas corpus to "allege any fact" for certain purposes. The purpose of that section is obvious and its inapplicability here seems clear. In the vast range of circumstances under which habeas corpus may be used, there are comparatively few cases in which that remedy is used to attack the validity of a final judgment. Habeas corpus may be used in connection with all types of controversies, both civil and criminal and both before and after judgment, for the purpose of having a determination of the legality of detention. It is, of course, necessary in most cases to show all the facts; but where habeas corpus is used to attack the *validity* of a final judgment which is the basis for the detention, it is only in certain "exceptional circumstances," to which reference will be hereinafter made and which are not present here, that any fact dehors the record in the criminal proceeding may be alleged or proved. It seems clear that if "any fact" could ordinarily be alleged and proved when a proceeding on habeas corpus is used to attack the *validity* of the final judgment which is the basis for the detention, then no judgment would ever become final, and habeas corpus, rather than being a remedy which is limited in its scope, would become the vehicle for obtaining a retrial at any time of any material issue which has previously been determined by the final judgment in a criminal proceeding.

In my opinion, the majority opinion presents no sound theory to support it. The result reached is directly contrary to settled rules and is in conflict with previous decisions of this court and the great weight of authority elsewhere.

Petitioner's Case Should Not be Decided Upon the Theory that it Presents "Exceptional Circumstances" Justifying a Total Departure from the Well-Established Rules Governing the Scope of Review on Habeas Corpus.

It is true, as pointed out in the majority opinion, that certain recent cases involving so-called "exceptional circumstances" have extended the scope of review on habeas corpus beyond the consideration of what were theretofore deemed to be strictly jurisdictional questions; and it is also true that certain recent cases have extended the inquiry in such "exceptional circumstances" beyond the face of the record in the criminal proceeding. Some of these more recent cases were reviewed in Re Bell, 19 Cal.2d 488, at pages 492 to 495, 122 P.2d 22. While the writ was discharged in the Bell case for the reasons there stated, the discussion in the opinion was in line with the established rule in this state that "One who is held or imprisoned because of the violation of an unconstitutional statute or ordinance * * * may secure his discharge on habeas corpus, either before or after conviction by the lower court." 13 Cal.Jur. 225, § 8; see, also, 25 Am.Jur. 164, § 29. With reference to the many authorities cited in the Bell case, it is significant to note that but few of said cases dealt with collateral attacks upon final judgments in criminal cases. In cases dealing with such collateral attacks and not involving the question of constitutionality of a statute or ordinance, the scope of review on habeas corpus and the extent of the inquiry have apparently been extended by this court and the United States Supreme Court only in those "exceptional circumstances" where fundamental constitutional questions were involved, such as due process and the like. See In re Connor, supra, 16 Cal.2d 701, 108 P.2d 10; In re Mooney, 10 Cal.2d 1, 73 P.2d 554; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

In Re Connor, supra, 16 Cal.2d 701, 108 P.2d 10, which was written by Mr. Justice Shenk, there is a discussion of the general rules applicable in habeas corpus proceedings in this state. In that case it is said, 16 Cal.2d at pages 705 and 706, 108 P.2d at page 13: "The function of the writ, as described in the case last cited, 'is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal.'

"Again, in [In] Re Murphy, 79 Cal.App. 64, 248 P. 1044, 1045, it is said: 'The law appears to be well settled that upon a petition for a writ of habeas corpus the scope of the inquiry is limited to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. This inquiry is limited to the face of the proceedings. In other words, the alleged invalidity must appear upon the face of the judgment attacked by this method. 12 R.C.L. 1185, § 8, p. 1240, § 59; 13 Cal.Jur. 217, § 4, and cases there cited. In Ex parte Long, 114 Cal. 159, 45 P. 1057, it is stated: "The inquiry to be had thereunder (on habeas corpus proceedings) does not extend beyond the question of jurisdiction and the validity of the process on its face." People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. [107], 111.'"

That case then continues by stating that "In the federal courts the rule may be said to permit a more extended inquiry in habeas corpus" (16 Cal.2d at page 706, 108 P.2d at page 13) but that "The application of the federal rule would not avail petitioner" (16 Cal.2d at page 707, 108 P.2d at page 14) as "Petitioner failed to sustain the burden of establishing that he did not waive his right [to counsel]" (16 Cal.2d at page 710, 108 P.2d at page 15). Then, on page 712, 16 Cal.2d, on page 16 of 108 P.2d referring to the fact that the scope of inquiry on habeas corpus in this state may "under exceptional circumstances" extend over the entire course of proceedings in the trial court and "May embrace additional evidence," the cases of In re Mooney, 10 Cal.2d 1, 73 P.2d 554, and Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969, are cited. A reading of those cases revals, however, that in each the "exceptional circumstances" was a claimed denial of the fundamental constitutional right to "due process of law." As stated in the quotation from the Frank case, found on page 713 of 16 Cal.2d, on page 17 of 108 P.2d, upon habeas corpus the court has the right "To look beyond forms and inquire into the very substance of the matter, *to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law,* and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not. * * *" (Emphasis added.)

In the case before us, we are not dealing with a claim that petitioner was denied any fundamental constitutional right in the trial of the case in which he was adjudicated an habitual criminal, nor are we dealing with a claim that any statute under which petitioner was adjudicated to be an habitual criminal was an unconstitutional statute. On the contrary, petitioner concedes the regularity of all proceedings in the trial court and is merely seeking a redetermination of the issues previously determined, without error, by the judgment which he seeks to nullify. There are therefore no such "exceptional circumstances" presented here as would warrant the departure from the well-established rules which limit our inquiry here to the face of the record in the trial court. If petitioner's claims are true, he simply failed to make those claims at the appropriate time when the questions could have been raised in the trial court. Having failed to raise the issue in the trial court or on appeal and the judgment having become final, there should be "no further legal recourse by any form of judicial review." People v. Lumbley, supra, 8 Cal.2d 752, 760, 68 P.2d 354, 358; People v. Moore, supra, 9 Cal.App.2d 251, 255, 49 P.2d 615.

While the last cited cases involved proceedings by way of writ of error *coram nobis*, the rules which should be applied here to this attack on habeas corpus upon the *validity* of the judgment should not be declared to permit a more extensive review. To follow the majority opinion to its logical conclusion would mean that every inmate of the penitentiaries who had pleaded guilty to the offense for which he was incarcerated and who thereafter might claim at any time that he had entered his plea of guilty by mistake, would be entitled to have the issues of law and fact tried out on habeas corpus when those issues should have been tried in the trial court on a plea of not guilty. This is precisely the illustration referred to in People v. Lumbley, supra, 8 Cal.2d 752, 68 P.2d 354, where it was said, 8 Cal.2d at page 760, 68 P.2d at page 358: "We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt." It has never before been suggested that such person would be entitled to obtain review on habeas corpus of the final judgment of conviction, but if the majority opinion is followed to its logical conclusion, that is the inevitable result.

It must be remembered that no error on the part of the trial court has been shown, but even in those cases where error might be shown, I believe the reasoning of the Supreme Court of Utah, in dealing with a similar question, should be applied. In Thompson v. Harris, 107 Utah 99, 152 P.2d 91, at page 92, the court said:

> "We have considered the arguments and authorities cited in support of each of these contentions. In the former opinion we held that the writ of habeas corpus could be used to correct jurisdictional errors and to determine whether or not the petitioner had been deprived of any constitutional right. Except in these two respects, errors in proceedings before a trial court must be corrected by appeal. One of the basic difficulties inherent in a contrary holding is the question of where to draw the line. Somewhere and sometime there must be an end to litigation. The writ of habeas corpus must not be used to discover and correct all errors which might creep into a criminal trial. The time for taking an appeal has wisely been limited by law. If the writ of habeas corpus were to be used to reach all defects in the trial which could be raised by a timely appeal, no conviction could ever become final. We recognize that some errors are more prejudicial to a defendant than are others, but if habeas corpus is to be used to correct error, where can we draw the line? Should we leave the determination as to when there has been and has not been sufficient error to warrant interference by the use of a writ of habeas corpus entirely to the discretion of each judge based on standards which he may invoke from his own mind? We believe that the only sound line that can be drawn is to restrict the use of the writ of habeas corpus to the correction of jurisdictional errors and to errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights. Anything short of that must be corrected on appeal or by the Board of Pardons."

From what has been said, it seems clear that petitioner has presented no such "exceptional circumstances" as to justify a departure from the long line of authorities limiting the scope of review on habeas corpus.

Petitioner's Case Cannot Be Decided Upon the Theory That It Involves the Question of Excessive Sentence.

In those cases in which it has appeared from the face of the record in the criminal proceeding that a petitioner has been sentenced for a term in excess of that permitted by law, relief by habeas corpus has been held available. In re Morck, 180 Cal. 384, 181 P. 657. Relief has been granted in such cases because the *judgment* entered did not, as a matter of law, warrant the imposition of the *sentence* imposed. But no authorities have been cited holding that where a court has jurisdiction and pronounces a valid judgment of conviction, the sentence based upon that judgment may be declared excessive on habeas corpus, where the sentence imposed is merely one for the term prescribed by law. Since the adoption of the indeterminate sentence law, the trial court ordinarily sentences the accused "for the term prescribed by law." It is for this reason that but little use has been found for the writ of habeas corpus to gain relief from excessive sentences since the adoption of the indeterminate sentence law. There still remain some offenses for which determinate sentences, within certain prescribed limits, may be imposed by the court, and in fixing such determinate sentences, the court may exercise a discretion. But for the vast majority of offenses, the sentence imposed is an indeterminate sentence which is fixed by law rather than by the court, subject to being made a determinate sentence later by action of the proper authorities.

Under our law relating to habitual criminals, it is required that the accused "shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life." Pen.Code, § 644. Therefore, when an accused is adjudged to be an habitual criminal, there is only one possible sentence, and that is life imprisonment. Ex parte Heath, 193 Cal. 192, 233 P. 546. This is a determinate, and not an indeterminate, sentence but the trial court has no discretion in imposing it. It is a sentence fixed by law rather than by the court. It is therefore necessary to distinguish between the *judgment* and the *sentence*, and when this distinction is borne in mind, it is apparent that there can be no question of excessive sentence involved in an habitual criminal case where the sentence imposed upon one who has been adjudged to be an habitual criminal is precisely the sentence prescribed by law. Such was the case here, and all discussion of excessive sentence is beside the point. When the majority opinion declares that "It follows that an excessive sentence was imposed upon the petitioner," it proceeds upon an erroneous theory; and the result reached in the majority opinion can only be obtained by nullifying the judgment adjudicating petitioner to be an habitual criminal, rather than by declaring excessive the sentence prescribed by law. As was said in Thompson v. Harris, supra, 152 P. 2d 91, at page 95, "To set this sentence aside we must go back behind the judgment." The majority opinion does not expressly nullify the habitual criminal adjudication but it declares that "The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this opinion." Such declaration, concerning the proper course to pursue, necessarily implies that the habitual criminal adjudication is nullified, for if it is not, there can be no justification for any "constituted authority to refix the sentence" in derogation of the provisions of section 644 of the Penal Code.

Manner of Determining Jurisdiction on Habeas Corpus Where the Attack is Upon the Validity of the Habitual Criminal Adjudication.

Having indicated that the present case may not be decided upon the theory that it involves either "exceptional circumstances" or an "excessive sentence," and that therefore the general rules limiting the scope of review on habeas corpus should be applied, no real problem is involved here concerning the manner of determining the jurisdiction of the trial court to enter the judgment adjudicating petitioner to be an habitual criminal. It was alleged and admitted in the trial court that petitioner had suffered two prior convictions for crimes specifically enumerated in section 644 of the Penal Code, and the majority opinion apparently concedes that neither an examination of the face of the record nor an examination of the entire record in the trial court would show either that the trial court was without jurisdiction or that it had committed any error. Under these circumstances it would appear unnecessary to discuss the broader question of the manner of determining jurisdiction on habeas corpus under other circumstances. However, the discussion in the majority opinions here and in the McVickers case covers a broad field and the views expressed therein are so widely at variance with my own, that it appears appropriate to discuss more generally the question of determining jurisdiction in habitual criminal cases. That which follows will be directed, of course, to the rules which should be applied in a proceeding on habeas corpus rather than to the rules applicable in the trial court or on direct attack by way of appeal; and will be further directed to those cases in which the attack is upon the *validity* of an habitual criminal adjudication based upon two prior convictions rather than to the rules which may be applicable when the attack is upon the *effect* of an habitual criminal adjudication based upon more than two prior convictions.

In such cases, as indicated at the outset in this dissent, the rules derived from the cited authorities are that the scope of review extends only to the question of the jurisdiction of the trial court to make the habitual criminal adjudication; that the inquiry does not extend beyond the face of the record in the criminal proceeding in which such adjudication was made; and that if it does not affirmatively appear from the face of such record that the trial court was without jurisdiction to make such adjudication, then the habitual criminal adjudication should not be nullified. In the application of these rules, it will be assumed that the word "jurisdiction" should be given its broadest meaning, embracing the question of the power of the court to act in the particular manner, as indicated in Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411, cited in the majority opinion. See also, Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942, 132 A.L.R. 715; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107. It will be further assumed that when the authorities which are cited with approval in In re Connor, supra, 16 Cal.2d 701 108 P.2d 10, 13, and which are quoted above, state that in determining the question of "jurisdiction" the "alleged invalidity must appear upon the face of the judgment" and also state that "the inquiry * * * does not extend beyond the question of jurisdiction and the validity of the process on its face"; and further state that the "inquiry is limited to the face of the proceedings," the indication is that for the purposes under discussion, the inquiry may extend to but not beyond the face of what may be termed the "judgment roll." See People v. Spivey, supra, 25 Cal.App.2d 279, 77 P.2d 247; 13 Cal. Jur. 225, § 7. The expression "face of the record," as used herein, is intended to mean the "face of the judgment roll." The question then remains as to when it may be said that the lack of "jurisdiction" affirmatively appears from the face of the record or judgment roll.

While no debatable question is presented in the instant case, perhaps a debatable question would arise in the numerous cases in which a prior conviction of felony in another jurisdiction had been alleged in the information for an offense which is not designated by a name identical with that of any crime specified in section 644 of the Penal Code. A typical example would be an information in which two prior convictions similar to the two challenged prior convictions in the McVickers case ("grand theft, a felony" and "nine counts of the crime of Violation of Section 218 of the Criminal Code of the United States of America [18 U.S.C.A. § 347]," a felony) had been alleged in the information and had been either admitted by the accused or proved, and had thereafter formed the sole basis for the judgment adjudicating the accused to be an habitual criminal. In such case the most that could be said is that it did not appear from the face of the record whether either alleged prior conviction was or was not a conviction for an offense within the purview of sections 644 and 668 of the Penal Code. Under these circumstances, it could not be held that it affirmatively appeared from the face of the record that the trial court was without jurisdiction to make the habitual criminal adjudication, and therefore the petitioner should be denied relief upon habeas corpus. In the numerous cases of this type which may arise, it is incumbent upon the accused to challenge the sufficiency of the alleged prior conviction in the trial court or on direct attack by way of appeal, but if he fails to do so and the judgment becomes final there should be "no further legal recourse by any form of judicial review." People v. Lumbley, supra, 8 Cal.2d 752, 760, 68 P.2d 354, 358; People v. Moore, supra, 9 Cal.App.2d 251, 255, 49 P.2d 615.

The foregoing suggested rules for the determination of jurisdiction on habeas corpus are in harmony with the previous decisions of this court in habeas corpus cases dealing with habitual criminal adjudications and are likewise in harmony with the previous decisions of the District Courts of Appeal in habeas corpus cases, with the exception of the few recent cases to which reference has already been made. While several decisions of this court are cited in the majority opinion herein and in the majority opinion in the McVickers case, this court has not up to the present time nullified a single habitual criminal adjudication in a proceeding on habeas corpus. In said majority opinions, the following cases of this court are cited: In re Rosencrantz, 211 Cal. 749, 297 P. 15; In re Rosencrantz, 205 Cal. 534, 271 P. 902; In re Boatwright, 216 Cal. 677, 15 P.2d 755; In re Brady, 5 Cal.2d 224, 53 P.2d 945. In *none* of those cases was an habitual criminal adjudication made by the trial court, and the question involved on habeas corpus was the *effect* of the judgment, and not the *validity* of the judgment. The same comment may be made with respect to the cases of In re Bertrand, 61 Cal.App.2d 183, 142 P.2d 351, and In re Spaulding, 8 Cal.App.2d 497, 48 P.2d 133, which are cited in the majority opinions. In In re Gilliam, 26 Cal.2d 860, 161 P.2d 793, there was an habitual criminal adjudication but it was not nullified. The question of the scope of review on habeas corpus was not discussed and it was merely held that upon the entire showing made, the petitioner there had made no showing entitling him to relief. Neither was the habitual criminal adjudication nullified in In re Tartar, 1 Cal.App.2d 400, 36 P.2d 419, nor in In re Miller, 133 Cal. App. 228, 23 P.2d 1034, which are likewise cited. As heretofore stated, the few recent decisions of the District Courts of Appeal which are not in harmony with these views are In re Connell, 68 Cal.App.2d 360, 156 P.2d 483; In re Howard, 69 Cal.App.2d 164, 158 P.2d 408; and In re Williams, 76 Cal.App.2d 161, 172 P.2d 558.

Before leaving the question of the manner of determining jurisdiction, I desire to make clear my views with respect to the decision in Thompson v. Harris, supra, 152 P.2d 91, the reasoning in which case the majority opinion refuses to follow. I believe that such reasoning should be followed insofar as it declares that there was no lack of "due process" and that therefore the general rules applicable on habeas corpus should be applied. But under the broadened meaning of the word "jurisdiction" in this state, this court would no doubt reach a different result under similar circumstances from that reached in the Thompson case, if, as stated, 152 P.2d on page 92 of the opinion there, "the information affirmatively disclosed that the two previous convictions upon which the state would rely to show that Thompson was an habitual criminal were not sufficient to support a conviction under the Habitual Criminal statute." It may be assumed from this statement that it affirmatively appeared from the face of the record that the prior convictions could not have been for offenses upon which an habitual criminal adjudication could have been based. In the application of the above-mentioned rules to such situation, it would undoubtedly be held in this state that it affirmatively appeared from the face of the record that the trial court was without "jurisdiction" to make the habitual criminal adjudication. But there is a vast difference between merely according to the word "jurisdiction" its broadened meaning on habeas corpus and, on the other hand, extending the inquiry to determine "jurisdiction" on habeas corpus beyond the face of the record in the criminal proceeding in which the habitual criminal adjudication was made. This is precisely what is done in the majority opinion herein, as it sanctions the examination not alone of the entire record in the criminal proceedings but also of any facts which may be presented in the habeas corpus proceeding, even though such facts may be contrary to the facts which were admitted or proved in such criminal proceeding. I find nothing in the present case to justify this wide departure from the established rules governing the scope of review on habeas corpus.

Conclusion.

It is apparent from what has been said that petitioner is not entitled to the relief demanded or to the relief accorded him by the majority opinion, unless this court is prepared to permit an unlimited review on habeas corpus of any judgment adjudicating an accused to be an habitual criminal. I am of the view that such unlimited review should not be permitted.

If perchance an injustice has been done in this case, petitioner's remedy is not by way of further judicial review but rather by way of an application for executive clemency. As was said in Thompson v. Harris, supra, 152 P.2d 91, at page 92: "Somewhere and sometime there must be an end to litigation."

In my opinion, the writ should be discharged and petitioner should be remanded without any declaration, express or implied, which has the effect of nullifying the judgment adjudicating him to be an habitual criminal.

EDMONDS and TRAYNOR, JJ., concurred.

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29 Cal.2d 264

Ex parte McVICKERS.

Cr. 4680.

Supreme Court of California, in Bank.

Dec. 3, 1946.

1. Criminal law ⚷1202(1)

In order to adjudge a defendant an "habitual criminal" the test is, not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of felonies enumerated in habitual criminal statute. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Habitual Criminal".

2. Criminal law ⚷1202(1)

The crimes enumerated in habitual criminal statute must be understood to be crimes as defined in laws of California, and, if committed elsewhere, regardless of names by which they may be designated, must in their substance come within California's definitions of the enumerated crimes. Pen.Code, § 644.

3. Habeas corpus ⚷28

Petitioner could, on application for habeas corpus, secure appropriate relief from an adjudication of habitual criminal status, if it appeared from facts shown, either upon face of the record or by satisfactory proof, that as a matter of law a prior conviction upon which the adjudicated status depended was of a crime which did not meet definition of any offense enumerated in habitual criminal statute. Pen.Code, §§ 644, 1484.

4. Criminal law ⚷1202(6)
Habeas corpus ⚷22(1)

The so-called adjudication of habitual criminal status is not an element of adjudicated guilt, nor is it a part of the "judgment of conviction," and hence an attack on adjudication of habitual criminal status on petition for habeas corpus is not an attack on the judgment of conviction. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment of Conviction".

5. Criminal law ⚿1202(1)

The habitual criminal statute does not create a substantive offense, habitual criminality, but rather it provides for more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment. Pen. Code, § 644.

6. Habeas corpus ⚿92(1)

The court in a habeas corpus proceeding is not necessarily confined under all circumstances to that which appears on face of the record in trial resulting in petitioner's conviction, but may hear additional evidence bearing upon infringement of petitioner's constitutional rights. Pen.Code, § 1484.

7. Habeas corpus ⚿1

Habeas corpus is essentially a "collateral attack" on a judgment. Pen.Code, § 1484.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

8. Criminal law ⚿1202(1)

The habitual criminal statutes contemplate that a defendant shall have been convicted in a judicial proceeding of a crime enumerated therein, and all the essential facts of defendant's guilt must be res judicata. Pen.Code, §§ 644, 668.

9. Criminal law ⚿1202(3)

In determining whether conviction in Utah of offense of grand larceny could constitute basis for an habitual criminal adjudication, it would be presumed that defendant suffered prior conviction for least offense punishable under Utah statute, in absence of showing of value of goods taken, which was but a misdemeanor under California Law. Pen.Code, §§ 487, 644; Laws Utah 1923, c. 67.

10. Criminal law ⚿1202(1)

Where it affirmatively appeared by record that prior Utah conviction alleged in information seeking to have defendant adjudicated an habitual criminal and admitted by defendant was conviction of an offense which, insofar as adjudicated facts were concerned, was by California law only a misdemeanor, the prior Utah conviction constituted no basis for an habitual criminal adjudication. Pen.Code, §§ 487, 644; Laws Utah 1923, c. 67.

11. Habeas corpus ⚿85(1)

Supreme Court in habeas corpus proceedings is authorized under statute to receive evidence dehors the record if such evidence is directed to proof of an issue which is cognizable in the proceeding. Pen. Code, § 1484.

12. Habeas corpus ⚿85(1), 92(1)

In habeas corpus proceeding to secure petitioner's release from custody on ground that he had been improperly adjudicated an habitual criminal, issue as to whether petitioner's prior convictions in federal court on nine counts of forging postal money orders were for felonies the essential substance of which was substantially same as California crime of forgery was properly before Supreme Court, and documentary evidence in favor of petitioner's detention could properly be considered. Pen.Code, §§ 644, 1484; Cr.Code, § 218, 18 U.S.C.A. § 347.

13. Criminal law ⚿1202(1)

A prior conviction of defendant in federal district court of forging postal money orders was conviction of an offense substantially similar to offense of forgery defined by California statute and enumerated in habitual criminal statute, so that it constituted a basis for an habitual criminal adjudication. Pen.Code, §§ 470, 473, 644; Cr.Code, § 218, 18 U.S.C.A. § 347.

14. Criminal law ⚿1202(1)

That forgery was not one of offenses enumerated in habitual criminal statute in 1928 when petitioner was convicted of forgeries of postal money orders in federal district court, did not preclude federal court conviction from constituting basis for an habitual criminal adjudication, where, at time primary offenses were committed, forgery was one of crimes enumerated in habitual criminal statute. Pen.Code, §§ 470, 473, 644; Cr.Code, § 218, 18 U.S.C.A. § 347.

15. Habeas corpus ⚿28, 50, 109

Where proof in habeas corpus proceeding to secure petitioner's release from custody showed that petitioner was an habitual criminal who had been previously twice, but not three times, convicted of felonies enumerated in habitual criminal statute, petitioner was entitled to be accorded the benefits as well as penalties of the law applicable to persons who had suffered two, rather than three, prior convictions, but where he was not, as such habitual criminal, presently entitled to discharge or to release on parole, the writ was discharged, and petitioner remanded to custody. Pen.Code, § 644.

SPENCE, EDMONDS, and TRAYNOR, JJ., dissenting in part.

◆

Proceeding in the matter of the petition of John Francis McVickers for a writ of habeas corpus to secure release from custody.

Writ discharged and petitioner remanded to custody.

Prior opinion 161 P.2d 609.

John Francis McVickers, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., Jess Hession, Asst. Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

Petitioner, by application for the writ of habeas corpus, seeks review of the adjudication or finding that he, "having been previously three times convicted, upon charges separately brought and tried, and having served separate terms therefor in state and/or federal penitentiaries for crimes enumerated in Section 644 of the Penal Code * * * is an habitual criminal under the provisions of Section 644 of the Penal Code." For the reasons hereinafter expressed we have concluded that a prisoner can, on application for habeas corpus, attack and secure appropriate relief from such an adjudication of habitual criminal status where it appears from the facts shown, either upon the face of the record or by satisfactory proof, that as a matter of law a prior conviction upon which the adjudicated status depends is of a crime which does not meet the definition of any offense enumerated in section 644. From the showing here it appears as a matter of law that petitioner in truth has been not *three* times but only *twice* convicted of felonies enumerated in section 644 of the Penal Code.

The pertinent provisions of the Penal Code under which petitioner was adjudged an habitual criminal, as they read at the time petitioner committed the primary offenses of which he was convicted (violations of the state narcotic laws) and at the time judgment against petitioner was entered, were as follows: Section 644 (as am. Stats.1935, p. 1699): "Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of * * * burglary, * * * grand theft, * * * forgery, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years. Every person convicted in this State of any felony who shall have been previously three times convicted, upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of * * * burglary, * * * grand theft, * * * forgery, * * * shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole * * *." Section 668 (as am. Stats.1927, p. 1065): "Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666 and 667, and to the same extent as if such prior conviction had taken place in a court of this state."

[1, 2] It is settled that "In order to adjudge a defendant an habitual criminal the test is not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of *felonies enumerated in section 644 of the Penal Code.*" (Italics added.) (People v. Lohr (1938), 28 Cal.App.2d 397, 399, 82 P.2d 615.) It is also settled that the crimes enumerated in section 644 must be understood to be crimes *as defined in the laws of California* and, if committed elsewhere, regardless of the names by which they may be designated, *must in their substance come within California's definitions of the enumerated crimes.* (People v. McGee (1938), 24 Cal.App.2d 391, 394, 75 P.2d 533; People v. Morrison (1938), 26 Cal.App.2d 616, 618, 80 P.2d 94; People v. Lohr (1938), supra; People v. McChesney (1940), 39 Cal.App.2d 36, 41, 102 P.2d 455; In re Taylor (1944), 64 Cal.App.2d 47, 50, 148 P.2d 143; Ex parte Connell (1945), 68 Cal.App.2d 360, 363, 156 P.2d 483; In re Howard (1945), 69 Cal.App.2d 164, 158 P.2d 408.) Petitioner seeks to show that two of the prior convictions which formed the basis of the adjudication that he is an habitual criminal—one a conviction of an offense against the laws of Utah and one a conviction of an offense against the laws of the United States—were of offenses the adjudicated elements of which did not amount to "crimes enumerated in section 644" as defined by the laws of California.

The record of petitioner's conviction of the primary or substantive offenses shows that, by information filed January 6, 1938, petitioner was charged in three counts with violation of the state narcotic laws. As to the three asserted prior convictions of felony and service of a term of imprisonment for each, the record shows that the alleged prior convictions were for "Grand Larceny, a felony," in Utah; "burglary, First Degree, a Felony," in Nevada; and "Violation of Section 218 of the Criminal Code of the United States of America, 18 U.S.C.A. § 347, [nine counts of forging postal money orders], a felony." Petitioner pleaded not guilty to counts one and two, guilty to count three, and admitted the three prior convictions as charged. He was tried and found guilty of the primary offenses charged in counts one and two. Thereafter, upon arraignment for judgment, he moved that he be adjudged "not an habitual criminal" on the ground that his was one of those "exceptional cases" in which "the court may, in its discretion, provide that the defendant is not an habitual criminal." (Pen.Code, § 644.) The motion was denied. Judgment of conviction and adjudication of habitual criminality was entered. Petitioner made no motion in arrest of judgment or for a new trial and did not appeal.

After the time to appeal had expired petitioner moved the trial court to vacate or modify the judgment. Petitioner's attack on the judgment was directed only at the determination as to prior convictions. His motion was denied and he appealed. The order denying his motion was affirmed. (People v. McVicker (1940), 37 Cal.App.2d 470, 99 P.2d 1110.) Petitioner's principal contentions on that appeal were substantially the same as those now advanced, namely, that the Utah conviction and the federal conviction were not in their actual substance such as to constitute any basis for lawful adjudication of habitual criminality. The District Court of Appeal relied on the following language from People v. Moore (1935), 9 Cal.App.2d 251, 255, 49 P.2d 615, quoted with approval in People v. Lumbley (1937), 8 Cal.2d 752, 760, 68 P.2d 354: "We fail to see how the position of defendant in this proceeding [in effect, a petition for writ of error coram nobis] is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea. [Citations.] If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case." [9 Cal.App.2d 251, 49 P.2d 617] The language quoted from the opinion of the District Court of Appeal can have no application to this habeas corpus proceeding, for that court went on to say (at page 475 of 37 Cal.App.2d, 99 P.2d 1110 and in accord with intimations in People v. Lumbley (1937), supra, 8 Cal.2d 752, 755, 762, 68 P.2d 354), "If the said two 'priors' were improperly invoked * * * then upon the arrival of the time when appellant [petitioner McVickers] would be entitled to release from confinement for the primary offenses, the legality, of his continued or prolonged confinement solely because of the prior convictions can be tested on habeas corpus." [37 Cal.App.2d 475, 99 P.2d 1112] Therefore, regardless of whether we now view the above quoted excerpts from the opinion of the District Court of Appeal as being correct or erroneous in law, and irrespective of whether pronouncements in an opinion rendered on an appeal should always be regarded as law of the case, binding in a subsequent habeas corpus proceeding, it appears here that the judgment of the District Court of Appeal was based substantially upon its holding that petitioner, in due time, would be entitled to have "the legality of his continued or prolonged confinement solely because of the prior convictions * * * tested on habeas corpus," and under such circumstances he certainly is not to be denied relief solely on the ground that the holding by the District Court of Appeal as to procedure was erroneous. Independently of the holding of the District Court of Appeal we are, however, for reasons hereinafter set forth, satisfied that the remedy of habeas corpus is open to petitioner.

The arguments against permitting a collateral attack, by application for habeas corpus, on a determination that the petitioner is an habitual criminal are set forth in Thompson v. Harris (1944), 107 Utah 99, 152 P.2d 91, 92 (where "the information affirmatively disclosed that the two previous convictions upon which the state would rely to show that Thompson was an habitual criminal were not sufficient to support a conviction under the Habitual Criminal statute"). It is there said that the writ of habeas corpus can be used "to correct jurisdictional errors and to determine whether or not the petitioner had been deprived of any constitutional right. Except in these two respects, errors in proceedings before a trial court must be corrected by appeal. One of the basic difficulties inherent in a contrary holding is the question of where to draw the line. Somewhere and sometime there must be an end to litigation. The writ of habeas corpus must not be used to discover and correct all errors which might creep into a criminal trial. * * * We recognize that some errors are more prejudicial to a defendant than are others, but if habeas corpus is to be used to correct error, where can we draw the line? * * * We believe that the only sound line that can be drawn is to restrict the use of the writ of habeas corpus to the correction of jurisdictional errors and to errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights."

[3] The courts of this state have uniformly permitted more extensive use of the writ of habeas corpus to review adjudications of habitual criminality than would be possible under the view of the Utah court quoted above. We are satisfied, for the reasons hereinafter set forth, that the writ can consistently be made available to a prisoner who has been adjudged an habitual criminal although in truth and fact he is not, without so enlarging its scope as to make it in effect (as suggested in the above quotation) a writ of error to review the correctness of a conviction. It is important to note that *petitioner here raises no question as to the validity or correctness of a judgment of conviction. His attack is directed only against a determination of facts on which depend the length of time during which he can be legally imprisoned and the possibility of his being released on parole.*

[4, 5] The so-called adjudication of habitual criminal status is not and cannot be an element of adjudicated guilt, nor is it, properly speaking, a part of the judgment of conviction. Despite language of some cases (People v. Delany (1874), 49 Cal. 394; People v. Coleman (1904), 145 Cal. 609, 612, 79 P. 283) to the contrary, statutes which provide for increased punishment of those who have previously offended do not create specific, aggravated crimes. Section 644 of the Penal Code

does not create a substantive offense, habitual criminality; rather it provides for more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment. (24 C.J.S., Criminal Law, § 1958, p. 1143.) That prior convictions are not elements of a substantive offense is necessarily so under the reasoning of the cases which have upheld the constitutionality of section 644 against the attack that it is ex post facto as applied to convictions suffered prior to its enactment. "In such case, it is the second or subsequent offense that is punished, not the first." (Cooley on Constitutional Limitations, 8th Ed., p. 553, quoted and relied on in In re Rosencrantz (1928), 205 Cal. 534, 540, 271 P. 902, and cases there cited.) Similarly, as to the contention that punishment under a law which provides more severe punishment because of a prior conviction places the defendant twice in jeopardy for the first offense, it is held that "he is not again punished for the first offense, but the punishment for the second is increased." (People v. Stanley (1873), 47 Cal. 113, 116, 17 Am.Rep. 401.) That prior convictions are not elements of a substantive offense likewise appears from section 1158 of the Penal Code, which requires the jury to find separately on the issue of prior convictions, and from such cases as People v. Eppinger (1895), 109 Cal. 294, 41 P. 1037, which holds that a general verdict, "guilty as charged," must be treated as a finding against defendant as to the basic offense alleged but in favor of defendant as to alleged prior convictions.

From the foregoing discussion it follows that formal adjudication that a prisoner is an habitual criminal does not constitute an adjudication of guilt. It involves merely the determination of certain facts, all of which are matters of record, and, ordinarily, the declaration of a conclusion from such facts. The facts, rather than the conclusion, operate to prolong the prisoner's confinement and limit his right to parole. Although this court has said that the trial court should in proper cases "formally adjudge" that defendant is an habitual criminal, it has held that such formal adjudication is unnecessary. (In re Boatwright (1932), 216 Cal. 677, 683, 15 P.2d 755; People v. Vaile (1935), 2 Cal.2d 441, 444, 42 P.2d 321; see 24 C.J.S., Criminal Law, § 1971, subd. b, p. 1174.) It is, therefore, obvious that a determination of habitual criminal status, even though referred to as an adjudication, does not involve the validity or finality of a judgment of conviction, as such, but relates only to the length of the term of imprisonment and the right to parole, and, hence an attack on the adjudication of habitual criminal status is not an attack on the judgment of conviction.

It is a part of the philosophy of the indeterminate sentence law and our whole penological system that, within prescribed limits, the length of terms of imprisonment and rights of parole shall be subject to redetermination from time to time. (See Pen.Code, §§ 1168, 3020, 3025, 3040, 3053, 3060, 3065.) The trend of modern theory on the subject is definitely away from attaching to judgments of conviction absolute finality insofar as the length of terms of imprisonment is concerned. The judgment of conviction, as such, retains full finality but the matter of length of terms of imprisonment and other elements of the penological process relating to punishment, rehabilitation, supervision, etc., are being largely severed from direct, specific, or final control by the judgment of conviction. It seems, therefore, that, if we are not by established procedural law precluded, it will be more in harmony with the spirit and purpose of our substantive criminal law as it is intended to operate after conviction, to regard an adjudication of habitual criminality as having somewhat less finality and sanctity than a judgment of conviction. It will likewise be more in harmony with the policy of law if we can entertain petitioner's application on its merits rather than dismiss it on technical grounds.

Since the finding or adjudication as to a former conviction and habitual criminal status is severable from the proceedings and judgment on the primary offense (see 8 Cal.Jur. 646, § 617) no violence is done to the finality of the judgment of conviction by permitting a collateral attack on the determination as to a prior conviction. The fact of a prior conviction is not ordinarily difficult of proof; it can be shown by certified copies of the indictment or information and the judgment. Service of a term of imprisonment can be shown by prison records. Nor is the precise extent of that which is res judicata, or the legal effect, of a foreign prior conviction difficult of ascertainment; both can be determined by examination of the pleadings and consideration of the judicially noticed law of the other state in the light also of the law of this state. The language of section 668 of the Penal Code and the decisions hereinabove cited denote the limits of inquiry proper either on the trial or on review: whether the prisoner has been "convicted in [another] state" and served a term of imprisonment therefor in a state prison or a federal penal institution, and whether the essential elements of the offense of which he has been *convicted* are the same or substantially the same as those required by California law to constitute an offense enumerated in section 644. Therefore, to permit reexamination of adjudications as to prior convictions on applications for habeas corpus where otherwise proper, does not place upon the courts the burden of considering the uncertain testimony of witnesses as to events long past.

The extent of the growth of the function of habeas corpus collaterally to attack judgments of conviction in this state is illustrated by comparing with recent decisions (e. g., In re Connor (1940), 16 Cal. 2d 701, 712, 108 P.2d 10; Ex parte Bell (1942), 19 Cal.2d 488, 122 P.2d 22, and cases there cited; Ex parte Byrnes (1945), 26 Cal.2d 824, 827, 161 P.2d 376) the case of Ex parte Max (1872), 44 Cal. 579, 581, which pointed out the "obvious distinction between the office of a writ of error or an appeal, on the one hand, and a writ of habeas corpus upon the other." Petitioner Max, as it appeared from the judgment roll, was found guilty of a crime which amounted to a *misdemeanor;* he was adjudged guilty of a *felony* and sentenced to imprisonment in the state prison; it was held that this was mere error which could not be inquired into on habeas corpus. In contrast is the declaration in In re Byrnes (1945), supra, 26 Cal.2d at page 827, 161 P.2d at page 377, that "It is well settled that a writ of habeas corpus ordinarily may not be employed as a substitute for an appeal [citation], yet the scope of inquiry in such proceedings has been broadened rather than narrowed [citation], and the writ may be used to present questions of law that cannot otherwise be reviewed or are *so important as to justify an extraordinary remedy* [citation]." (Italics added.) Likewise, in Ex parte Bell (1942), supra, 19 Cal.2d at page 494, 122 P.2d at page 26, we find the statement, "There are other situations in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate."

Corresponding to the development of habeas corpus as a means of attack on a judgment of conviction has been a broadening of the scope of the writ as a means of attack on an adjudication of habitual criminal status. The cases which have broadened this function of the writ present a logical and chronological line of development, but they do not expressly recognize such development nor do they state grounds for a distinction between the scope of habeas corpus to attack collaterally a judgment of conviction and its scope to attack collaterally an adjudication of habitual criminality. Without summarizing this line of cases in detail it may be appropriate to note that when the scope of the writ was first defined in this state, with emphasis on the rules that the inquiry was limited to questions of jurisdiction and the validity on its face of the process and that questions of fact could never be retried (Ex parte Bird (1861), 19 Cal. 130; Ex parte Gibson (1867), 31 Cal. 619, 624, 628, 91 Am.Dec. 546; Ex parte McCullough (1868), 35 Cal. 97, 101; Ex parte Max (1872), supra, 44 Cal. 579, 581), statutes providing for increased punishment of previous offenders were not a part of our law. It is understandable that the courts may have felt somewhat handicapped by tradition and therefore somewhat uncertain as to theory in applying a remedy as ancient as habeas corpus to a situation arising under the comparatively modern habitual criminal and undeterminate sentence laws. Nevertheless, this court and the District Courts of Appeal have not hesitated to inquire into questions of so-called "mere error" going to the whole basis of the determination when an adjudication of a prior conviction (habitual criminal status) was attacked on habeas corpus. (In re Rosencrantz (1931), 211 Cal. 749, 297 P. 15; In re Brady (1936), 5 Cal.2d 224, 226, 53 P.2d 945; People v. McVicker (1940), supra, 37 Cal.App.2d 470, 475, 99 P.2d 1110; In re Taylor (1944), supra, 64 Cal.App.2d 47, 50, 148 P.2d 143; Ex parte Connell (1945), supra, 68 Cal.App.2d 360, 156 P.2d 483; In re Howard (1945), supra, 69 Cal. App.2d 164, 158 P.2d 408; In re Thompson (1946), 72 Cal.App.2d 747, 165 P.2d 533.) In People v. Lumbley (1937) supra, 8 Cal.2d 752, 755, 762, 68 P.2d 354, it was intimated that the question of the effect of a pardon, shown by evidence outside the record, upon the correctness of an adjudication of prior conviction and service of a term therefor, might be raised on habeas corpus.

[6, 7] Furthermore, it should be noted, in a habeas corpus proceeding we are not by our statute or by recent judicial holdings necessarily confined under all circumstances to that which appears on the face of the record. Section 1484 of the Penal Code provides that on such proceedings the petitioner may "allege *any fact* to show either that his imprisonment or detention is unlawful, or that he is *entitled to his discharge.* The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party *as the justice of the case may require* * * *." (Italics added.) Habeas corpus is essentially a collateral attack. (4 Cal.Jur. 1021, § 3; 13 Cal.Jur. 217, § 3.) It is specifically held in Ex parte Bell (1942), supra, 19 Cal.2d 488, 501, 122 P.2d 22, 30 that "A petitioner seeking habeas corpus * * * is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights. [Citations.] This examination is made, not to pass upon the sufficiency of the evidence to support the verdict, but to determine what the verdict actually was, so that the court may decide whether it violates constitutional guaranties." Again, in Ex parte Connor (1940), supra, 16 Cal.2d 701, 712, 108 P.2d 10, 17, the rule was stated: "The scope of inquiry on habeas corpus in this state may, * * * under exceptional circumstances, extend over the entire course of proceedings in the lower courts [citations], and may embrace additional evidence received by this court either directly or under an order of reference." If a judgment of conviction, with its greater historical finality, is upon any ground open to the collateral attack of habeas corpus on evidence dehors the record it would seem that the ancillary adjudication of habitual criminality (requiring merely a consideration of documentary and record evidence) should be vulnerable to the attack of habeas corpus, whether on evidence dehors the record or otherwise, on the ground (as sometimes phrased) that the trial court lacked "jurisdiction" to adjudicate the status where the uncontradicted evidence is, as a matter of law, inadequate to support the adjudication. Whether the legal ground of the attack be designated as a "lack of jurisdiction" or as a question of law "so important as to justify an extraordinary remedy" the impelling reasons and the conclusion would seem to be the same.

In addition to the objections, hereinabove discussed (that upholding the decisions of the cases which have broadened the historical scope of habeas corpus review might result in a situation where no judgment would be final and habeas corpus would be available to retry all issues of fact on which final judgments of conviction are based), other objections to the use of the writ in cases such as this have been suggested. Our attention is called to People v. Stone (1945), 69 Cal.App.2d 533, 536, 159 P.2d 701 (recently quoted with approval by this court in Ex parte Gilliam (1945), 26 Cal.2d 860, 866, 161 P.2d 793, 796). It is there said, "The confession of a prisoner at the bar of his guilt as charged as well as of the truth of the allegation of prior convictions is, in the absence of insane delusions, most satisfactory evidence upon which to convict and will support a judgment that he is an habitual criminal. [Citations.]" Further, our attention is called to section 1025 of the Penal Code, which provides that a defendant's admission of a prior conviction "must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings." These quotations from case and statute certainly can have no application to a situation like the present, where the fact (the prior conviction) charged and admitted is as a matter of law, upon the face of the pleading, wholly insufficient to form the basis for an adjudication of habitual criminality.

[8] Sections 644 and 668 of the Penal Code contemplate that a defendant shall have been *convicted* in a judicial proceeding of a crime enumerated in section 644. All the essential facts of his guilt must be res judicata. In applying section 644 the courts of this state may take cognizance only of what has been lawfully adjudicated. Any other rule would lead to absurd consequences. If our trial courts could take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant had been convicted in another state of grand theft as defined in our code despite the fact that he had been there charged, tried, and convicted under a statute defining another offense (here, an offense the only adjudicated elements of which amount to petty theft in California), then our courts could also take evidence and decide that the defendant had been convicted in the other state of robbery or burglary or bribery, or any other offense enumerated in section 644, even though he had never been charged with, placed upon trial for, or adjudged guilty of, any of those offenses in such other state. Respondent relies upon certain language in In re Taylor (1944), supra, 64 Cal.App.2d 47, 51, 148 P.2d 143, 144, relating to the presumption of the verity of a judgment. But if the presumption of the verity of a judgment were implicitly relied upon in habeas corpus proceedings then such proceedings could rarely if ever benefit a defendant after conviction. The language referred to actually is not at all in point on the question before us. The Taylor case was decided adversely to the petitioner because, while his petition purported to show that the prior conviction in North Carolina, the efficacy of which as a basis for habitual criminality adjudication he challenged, was for the theft of tobacco "of the value of one hundred dollars," the record before the appellate tribunal disclosed that "on the same occasion of the indictment and conviction for the theft of tobacco" of the value of one hundred dollars the same defendant was indicted for and convicted of the offense (committed on the same day as the theft of the tobacco) of "with force and arms" stealing "an automobile of the value of four hundred dollars." Apparently it did not clearly appear what evidence had been before the trial court when the habitual criminal adjudication was made. The information charged the defendant, in somewhat general terms, with having suffered a prior conviction "for 'the crime of Larceny, a felony'" committed "in Wilson County, North Carolina." The only presumption the District Court of Appeal indulged in favor of the verity of the judgment was that in the absence of proof to the contrary "the complete record of petitioner's prior convictions in the state of North Carolina was before the trial court, and that the court in adjudging him to be an habitual criminal did so with due regard to the provisions of section 644 of the Penal Code." Actually, that case, far from supporting respondent, sustains petitioner. With reference to the allegations of the petition therein tending to show that the prior conviction was for the theft only of the tobacco valued at one hundred dollars, the court said (at page 50 of 64 Cal.App.

2d, at page 144 of 148 P.2d): "If nothing further was disclosed by the record before us we would feel compelled to grant the writ." But upon the showing that the petitioner *had in truth been convicted* on an indictment specifically charging the theft of property "Of the value of four hundred dollars" and upon the lack of any showing that such proof had not been made to the trial court, the writ was discharged. Such case is obviously materially different from that before us where the only conviction (in Utah) alleged or proved was for theft of property specifically charged to be "of a value exceeding $50.00."

[9, 10] The pertinent averment of the information in this case is that prior to the commission of the alleged substantive offenses petitioner in 1924 "was, in the District Court of the State of Utah * * * convicted of the crime of Grand Larceny, a felony, and * * * served a term of imprisonment therefor." Since the allegation specifically charges conviction of 'Grand Larceny" in *Utah* it is, of course, obvious that any court in which it is presented must look at once to Utah's definition of grand larceny to ascertain whether the conviction there of that offense is a conviction of a felony enumerated in our section 644. The pertinent law of Utah is not a fact outside the record of local conviction, any more than the very California statute upon which the prosecution is based is a fact outside the record. We are required to take judicial notice of the laws of our sister states (Code Civ.Proc. § 1875, subd. (3)). In California grand larceny (theft) is committed "When the money, labor or real or personal property taken is of a value exceeding two hundred dollars" (Pen.Code, § 487), but in Utah "Grand larceny is committed * * * when the property taken is of a value exceeding $50.00" (Laws of Utah, 1923, p. 138, ch. 67, being the statute in force when petitioner committed the offense of which he was there convicted.) The pleading and proof or admission of a conviction for grand larceny in Utah, without more, establishes that petitioner was convicted of the theft of property of a value of $50.01, a crime which is not enumerated in section 644 of the Penal Code.

The conclusion above announced is in full accord with the decision of the District Court of Appeal (hearing in this court denied) in People v. Lohr (1938), supra, 28 Cal.App.2d 397, 399, 400, 82 P.2d 615, 617, wherein it was expressly held that "It was necessary for the prosecution to *charge and prove* that the prior convictions were among those set forth in section 644 in order to adjudge the defendant an habitual criminal" (Italics added) and that where the "Charge in the information does not designate the section of the * * * Act upon which defendant was convicted and the record furnishes * * * no assistance in this regard" the reviewing (as well as the trial) court "Must therefore assume" that defendant suffered the prior conviction *for the least offense punishable under the statute.* To the same effect is People v. Morrison (1938), 26 Cal.App.2d 616, 80 P. 2d 94. The proposition declared is eminently correct. It is in accord with the often stated principle that "the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute." (People v. Ralph (1944), 24 Cal.2d 575, 581, 150 P.2d 401, 404, and cases there cited.)

It is, of course, true that after a trial on conflicting evidence and a verdict against a defendant, every reasonable inference of which the evidence admits in favor of the verdict, and, hence, against the defendant, will be assumed by a reviewing court, but we have no such situation now before us. We have only the record to consider. That record discloses a specific charge of previous conviction of "Grand Larceny" in Utah and petitioner's admission of that charge. By no process of law or reason acceptable to American standards can such admission of defendant be construed to admit more than the charge laid. There was no further proof. The trial court, therefore, was bound to assume, as are we now, that defendant suffered the prior conviction for the least offense punishable under the Utah statute, which is but a misdemeanor under California law. Therefore, the determination that petitioner is an habitual criminal with *three* prior convictions is, upon the face of the record, not supported by it. (If we go outside the record here the result is the same. The information filed in the Utah proceeding, a copy of which is attached to the petition, expressly alleged that the property stolen was of "a value in excess of $50.00." By the most elementary rules of pleading an adjudication on, or admission of, such charge would establish a value of $50.01 and no more.)

It has long been the law, even in regard to a judgment of conviction, that "if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void and the prisoner should be discharged." (Ex parte Mirande (1887), 73 Cal. 365, 371, 14 P. 888; see, also, Ex parte Kearny (1880), 55 Cal. 212, 221.) Here it affirmatively appears by the record that the prior Utah conviction alleged in the information and admitted by defendant is a conviction of an offense which, insofar as the adjudicated facts are concerned, is by California law a misdemeanor and, hence, constitutes no basis for habitual criminal adjudication. No question of sufficiency or weight of evidence is involved; the facts are not disputed. Upon the undisputed facts it follows inescapably as a matter of law that the Utah prior conviction cannot support habitual criminal adjudication. In the same sense in which it is said, for example, that the Industrial Accident Commission does not have jurisdiction to award permanent, total disability payments where the evidence without conflict establishes only temporary, partial disability, it may be said here that the trial court was without jurisdiction to adjudicate habitual criminal status on the basis of the Utah conviction as charged in the information and admitted by petitioner.

[11-13] Petitioner contends that the determination that he was previously convicted of "forgery, a felony," and served a term of imprisonment therefor is also insufficient as a basis of the adjudication that he is an habitual criminal. This contention probably would have to be sustained if we were confined to matters appearing in the trial court record of conviction. The information, in this regard, charged merely that the defendant (petitioner, here) had been previously "in the United States District Court * * * convicted upon nine counts of the crime of Violation of Section 218 of the Criminal Code of the United States * * * and said defendant served a term of imprisonment therefor in the federal prison." Section 218 of the Criminal Code (18 U.S.C.A. § 347) enumerates many prohibited acts some of which, if comparable to any state offense, would amount to no more than misdemeanors but others of which are comparable to the state crime of forgery. We have hereinabove referred to the fact that in habeas corpus proceedings we are not necessarily confined to consideration of matters of record in the trial proceedings. We are satisfied that section 1484 of the Penal Code in directing the court or judge "to hear such proof as may be produced against such imprisonment or dentention, *or in favor of the same*" (Italics added), fully authorizes the reception of evidence dehors the record if such evidence is directed to the proof of an issue which is cognizable in the proceeding. We are further satisfied that the issue as to whether petitioner's convictions in the federal court were for felonies the essential substance of which is the same or substantially the same as the California crime of forgery (enumerated in section 644 of the Penal Code), is properly before this court and that the documentary evidence produced by respondent "in favor of" the detention of petitioner may properly be considered by us. From such documentary evidence (certified copies of the indictment and judgment in the federal matter) it appears that petitioner was convicted of nine counts of forging postal money orders. Section 470 of our Penal Code, which defines forgery, lists as the subjects of forgery "almost every conceivable kind and character of writing." (People v. Munroe (1893), 100 Cal. 664, 665, 35 P. 326, 24 L.R.A. 33, 38 Am.St.Rep. 323; see, also, People v. Turner (1896), 113 Cal. 278, 280, 45 P. 331; People v. McKenna (1938), 11 Cal.2d 327, 332, 333, 79 P.2d 1065; People v. Di Ryana (1908), 8 Cal.App. 333, 336, 96 P. 919; In re Parker (1943), 57 Cal.App.2d 388, 392, 134 P.2d

302.) In addition to more particularly designated instruments the section lists such general descriptions as "any transfer or assurance of money, * * * power to receive money, * * * writing obligatory, * * * or other contract for money * * *." We entertain no doubt that the forgery of a United States postal money order is an offense within section 470 and, therefore, would be punishable by imprisonment in the state prison (Pen. Code, § 473).

[14] It is immaterial that forgery was not one of the offenses enumerated in section 644 of the Penal Code in 1928, when petitioner committed and was convicted of the forgeries. Petitioner is not being punished for the forgeries but for the primary offenses of violations of the Narcotics Act. (In re Rosencrantz (1928), supra, 205 Cal. 534, 540, 271 P. 902; People v. Biggs (1937), 9 Cal.2d 508, 512, 71 P.2d 214, 116 A.L.R. 205.) At the time the primary offenses were committed forgery was one of the crimes enumerated in section 644 of the Penal Code. The determination that petitioner had been previously convicted of forgery was, therefore, proper as a basis for adjudging him an habitual criminal.

The correctness of the determination as to the prior conviction of burglary in Nevada is not here attacked.

[15] For the reasons above stated it appears that petitioner is an habitual criminal who has been previously twice, but not three times, convicted of felonies enumerated in section 644 of the Penal Code (as am. Stats.1935, p. 1699) and that he is, therefore, entitled to be accorded the benefits as well as the penalties of the law applicable to persons who have suffered two, rather than three, prior convictions; since he is not, as such habitual criminal, presently entitled to discharge or to release on parole, the writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and SHENK and CARTER, JJ., concurred.

SPENCE, Justice (concurring and dissenting).

I concur with the conclusion reached in the majority opinion that the writ should be discharged and that the petitioner should be remanded to custody. I further concur with the conclusion reached therein sustaining the trial court's adjudication that petitioner is an habitual criminal by virtue of his two prior convictions of burglary and forgery. I dissent, however, from the conclusion reached with respect to the third prior conviction of grand larceny in Utah, and from the further conclusion that "petitioner is an habitual criminal who has been previously twice, but not three times, convicted of felonies enumerated in section 644 of the Penal Code (as am.Stats.1935, p. 1699) and that he is, therefore, entitled to be accorded the benefits as well as the penalties of the law applicable to persons who have suffered two, rather than three, prior convictions * * *." I am further in disagreement with much of the reasoning employed in the majority opinion.

The majority opinion reaches the conclusions from which I dissent after a lengthy discussion of the circumstances under which an habitual criminal adjudication may be nullified in a proceeding on habeas corpus. However, as the majority opinion here does not nullify but, on the contrary, sustains the trial court's adjudication that petitioner is "an habitual criminal," and as the conclusion in the majority opinion, which is the subject of disagreement, concerns only the *effect* of the habitual criminal adjudication upon petitioner's eligibility for parole, I shall discuss more fully in my dissent in another pending case, In re Seeley, Cal.Sup., 176 P.2d 24, the question of the circumstances under which an habitual criminal adjudication may be nullified in a habeas corpus proceeding. Suffice it to say here that I am entirely willing to concede that the scope of review on habeas corpus may be different when the issue is the *effect,* rather than the *validity,* of a final judgment. In those cases in which habeas corpus is used to test the *validity* of a final judgment in a criminal case, the general rule is, subject to certain exceptions which will be discussed in my dissent in the Seeley case, that the "attack upon the judgment is subject to rules applicable to collateral assaults upon judgments in other cases. Accordingly, the writ lies only when the judgment is void upon its face. * * *" 13 Cal.Jur. 240. But the rule appears to be otherwise when habeas corpus is used to test the *effect* of the judgment, for it is said in Hurd on Habeas Corpus 330, quoted with approval in In re Corryell, 22 Cal. 178, at page 182: "It acts directly on the effect of the judgment, to wit, the imprisonment; but only collaterally on the judgment itself."

As shown by the provisions of our habitual criminal law which were applicable to petitioner and are set forth in the majority opinion (Pen.Code, § 644, as am. Stats. 1935, p. 1699), it was provided that an accused should be "adjudged an habitual criminal" regardless of whether he had suffered two or more than two of the specified prior convictions. In either event the law provided that the sentence or term of imprisonment should be "imprisonment in the State prison for life." If the accused had suffered more than two priors, it was provided that he should "not be eligible for release on parole"; but if the accused had suffered only two priors, it was provided that he should "not be eligible for release on parole until he shall have served a minimum of at least twelve years." It is for this reason that any attack upon a *third* prior conviction does not involve an attack upon the *validity* of the judgment adjudicating petitioner's status as an habitual criminal but only an attack upon the *effect* of that judgment in its relation to eligibility for parole. And while I cannot agree with the majority view that a judgment making an habitual criminal adjudication is not entitled to be accorded the same sanctity and finality as any other judgment, I have no quarrel with the view that the scope of review on habeas corpus, in testing the *effect* of such judgment by inquiry concerning a *third* prior conviction, is not subject to the rigid rules applicable to a collateral attack upon the *validity* of the judgment itself.

Assuming therefore that the inquiry with respect to the third prior conviction of grand theft is not confined to the face of the record in the criminal action in which the habitual criminal adjudication was made, the entire showing made in this proceeding, including that appearing on the face of the record, may be briefly stated. In a criminal action instituted in this state in 1938, petitioner was convicted of three felonies consisting of violations of the state narcotic laws. In that action petitioner admitted three prior convictions of felonies and service of terms therefor in state and federal prisons. The three prior convictions, as alleged in the information and admitted by petitioner, were (1) a conviction in 1924, in Utah, of the crime of grand larceny, a felony; (2) a conviction in 1925, in Nevada, of the crime of burglary, first degree, a felony; and (3) a conviction in 1928, in the federal court in California, of nine counts of violation of section 218 of the United States Criminal Code, T. 18 U.S.C.A. § 347, a felony (forging and uttering United States post-office money orders). Petitioner was adjudged to be an "habitual criminal" and was sentenced to imprisonment in the state prison "for the term prescribed by law." No claim was made in the trial court that any one of said prior convictions was not for one of the crimes specified in section 644 of the Penal Code or that any one of the offenses for which petitioner had been previously convicted was not "an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison." Pen.Code, § 668. No motion for a new trial was made, no appeal was taken, and the judgment of the trial court adjudicating petitioner's status as an "habitual criminal" became final. Subsequently petitioner made an unsuccessful attempt to have the judgment modified or vacated and his motion was denied. The order denying the motion was affirmed on appeal. People v. McVicker, 37 Cal.App. 2d 470, 99 P.2d 1110.

The additional showing made in this proceeding with respect to the challenged third prior conviction of grand larceny consists of presenting to this court a copy of the information and a copy of the proceedings on sentence in the criminal action in Utah in 1924. It appears from the information that petitioner was jointly charged with another defendant with having committed the crime of "Grand Larceny, a felony," in that "The said defendants, on May 27, 1924, at the County of Weber, State of Utah, wilfully, unlawfully and feloniously took, stole and drove away a certain light six Studebaker automobile, Model 1923, bearing motor No. EM95849, belonging to E. Rosenberg, the same having a value in excess of $50.00." Petitioner and his codefendant there entered pleas of guilty to the offense charged and were sentenced to and served terms for their offense in the Utah State Prison. Thus petitioner has merely shown that the challenged Utah prior conviction in 1924 of "Grand Larceny, a felony," was for the theft in 1924 of a 1923 Studebaker automobile "having a value in excess of $50.-00."

While it is true that this state had, prior to the time of the commission of the Utah offense, raised from $50 to $200 the value element in its definition of "grand larceny" (Stats.1923, ch. 129, p. 271; now known as "grand theft," Stats.1927, ch. 619, p. 1047), and while it is further true that this state had not, prior to the time of the commission of the Utah offense, provided that the theft of an automobile of any value should constitute grand theft (see amendment to Pen.Code, § 487, in 1927, Stats.1927, c. 619, p. 1047), petitioner has made no attempt to show that the offense committed, and for which he was convicted, in Utah in 1924 (the theft of a 1923 Studebaker automobile), was not at the time the offense was committed there "an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison." Pen.Code, § 668. Regardless of whether it might be deemed a matter of common knowledge that a 1923 Studebaker automobile had a value of more than $200 in 1924, petitioner has made no showing that the particular automobile, for the theft of which he was convicted in 1924 upon his plea of guilty, did not have a value in excess of $200. It is the settled rule that the burden of proof is on the petitioner in a habeas corpus proceeding (Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; In re De La Roi, 27 Cal.2d 354, 365, 164 P.2d 10; Ex parte Wallace, 24 Cal.2d 933, 938, 152 P.2d 1; In re Egan, 24 Cal.2d 323, 329, 149 P.2d 693; Ex parte Bell, 19 Cal.2d 488, 501, 122 P.2d 22; Ex parte Connor, 16 Cal.2d 701, 707, 108 P.2d 10; In re Mooney, 10 Cal.2d 1, 85, 73 P.2d 554; In re Williams, 183 Cal. 11, 15, 190 P. 163; In re Taylor, 64 Cal.App.2d 47, 51, 148 P.2d 143; Ex parte Knight, 62 Cal.App.2d 582, 586, 144 P.2d 882; In re Mirando, 15 Cal. App.2d 443, 445, 59 P.2d 544; People v. Sherman, 127 Cal.App. 417, 420, 15 P.2d 881; In re Gough, 124 Cal.App. 493, 496, 12 P.2d 968), and, in the absence of the showing mentioned, I am of the opinion that petitioner is entitled to no relief in this proceeding.

The majority opinion makes an entirely different approach to this problem and I am not certain of its implications. Is it implied by the majority opinion that regardless of the value of the property taken, a prior conviction of grand larceny in another jurisdiction can never be counted as a prior conviction here if the value element of the crime, as defined in the other jurisdiction, is less than $200? Or is it implied that such prior conviction of grand larceny may be counted provided the value of the property taken exceeds $200? If the latter be the implication intended by the majority opinion, then does not the majority opinion imply that the burden of proof with respect to the value element is on respondent rather than on petitioner in this habeas corpus proceeding?

The majority opinion states: "The pleading and proof or admission of a conviction for grand larceny in Utah, *without more,* establishes that petitioner was convicted of the theft of property of a value of $50.01, a crime which is not enumerated in section 644 of the Penal Code." (Emphasis added.) In support of this proposition, the majority opinion cites cases dealing with appeals from judgments adjudicating habitual criminal status, in which cases it is indicated that priors may not be counted unless the prosecution has sustained the burden in the trial court. Despite some apparent conflict on this subject in the authorities dealing with appeals (cf. People v. Shaw, 137 Cal.App. 533, 30 P.2d 1031, and People v. Hayes, 3 Cal.App. 2d 59, 39 P.2d 213), it will be assumed for the purpose of this discussion that the burden was on the prosecution in the trial court. Nevertheless, both authority and reason dictate that the burden is and should be placed on the petitioner in this habeas corpus proceeding. Petitioner has failed to sustain that burden in this proceeding, for it is he who rests upon the record of the Utah conviction "without more" and it appears probable that he could have made no further showing with respect to the Utah offense which would have been helpful to him.

As the majority opinion herein discusses quite generally the nature and operation of our habitual criminal law (Pen.Code, § 644), it appears appropriate here to make certain general observations with respect to these matters. As above indicated, however, the question of the circumstances under which a judgment adjudicating the accused to be an habitual criminal may be nullified on habeas corpus will be more fully discussed in my dissent in the Seeley case.

The majority opinion discusses "the philosophy of the indeterminate sentence law." This discussion appears to be beside the point in a case dealing with our habitual criminal law. The Legislature of our state was fully aware of the philosophy which had been embraced in our indeterminate sentence law when it decided to adopt a different philosophy with respect to habitual criminals by providing in our habitual criminal law that the sentence should be determinate rather than indeterminate. See People v. Vaile, 2 Cal.2d 441, 445, 42 P.2d 321. The Legislature clearly decreed that the indeterminate sentence law should have no application to habitual criminals when it fixed the sentence of every habitual criminal, regardless of whether he had suffered two or more prior convictions, at "imprisonment in the State prison for life." Pen.Code, § 644, as am. Stats. 1935, p. 1699. The distinction between those having suffered two prior convictions and those having suffered more than two prior convictions was not a distinction as to sentence or length of term of imprisonment but merely a distinction as to eligibility for parole. It therefore cannot be said that it is any part of the philosophy of our habitual criminal law that "the length of terms of imprisonment * * * shall be subject to redetermination from time to time." On the contrary, it is the philosophy of that law that a final adjudication that the accused is an habitual criminal shall fix for all time the sentence or length of term of imprisonment at life imprisonment, subject only to the provision relating to eligibility for parole in the case of those who have suffered but two prior convictions. See, however, recent amendments, Stats. 1945, ch. 934.

There are many who doubt the soundness of the philosophy underlying our habitual criminal law but there is no doubt concerning the philosophy which is embraced therein. The Legislature deemed it entirely sound and consistent to embrace one philosophy in our indeterminate sentence law, which applies to those with less than two prior convictions, and to embrace a different philosophy in our habitual criminal law which applies to those with two or more prior convictions. In view of the action of the Legislature, it does not appear proper for the courts to base their reasoning upon a confusion of these two philosophies.

It is reasoning based upon a confusion of these two philosophies which leads to the majority view that no particular finality or sanctity should be attached to a judgment making a "formal adjudication that a prisoner is an habitual criminal"; and that an attack on an habitual criminal adjudication "is directed only against a determination of facts," in which attack the rules applicable to collateral attack upon judgments should not be applied. I cannot agree with these conclusions.

Section 644 of the Penal Code provides that one who has suffered two or more of the specified prior convictions "shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life." Such adjudication is a final adjudication of the accused's status as an habitual criminal just as a judgment of conviction of a felony is a final adjudication of the accused's status as a felon. If the Legislature had not so intended, there would have been no purpose in providing in mandatory terms for such adjudication. Any judgment making such adjudication is subject to direct attack on appeal in the same manner as any other judgment and, after such judgment becomes final, a collateral attack thereon should be governed by the same rules which apply to collateral attacks on final judgments generally. It is no answer to point out that the omission of such adjudication would not be fatal provided "the judgment contained an adjudication that the defendant had been found guilty of the several crimes which, when committed by a single person, rendered him an habitual criminal." People v. Vaile, supra, 2 Cal.2d 441, 444, 445, 42 P.2d 321, 322. In the Vaile case, there was no question, under the findings of the court, of the sufficiency of the prior convictions under section 644 of the Penal Code and it was merely held that the *effect* of such findings was the same as though the habitual criminal adjudication had actually been made. That case arose on appeal and it was neither held nor indicated that a judgment adjudicating habitual criminal status should be treated in a manner different from other judgments when subjected to collateral attack. On the other hand, it seems clear that where no habitual criminal adjudication is made, an attack in a proceeding on habeas corpus on a judgment containing mere findings of prior convictions would be an attack on the *effect* of such judgment rather than an attack upon its *validity*.

There are certain recent cases decided in the District Courts of Appeal, some of which are cited in the majority opinion and some of which lend support to the views expressed in the majority opinion. The first of these cases was Ex parte Connell, 68 Cal.App.2d 360, 156 P.2d 483, 484, which was decided in 1945. The court there, without discussing the question, apparently treated the scope of review on habeas corpus of an habitual criminal adjudication as being at least equally as broad as the scope of review on appeal. In this respect I believe the court erred. It is significant to note that the decision in the Connell case was based upon authorities dealing with direct attack upon appeal. Not a single authority was cited there dealing with collateral attack on habeas corpus. The court there did not confine its review to an examination of the face of the record in the criminal proceeding in which the habitual criminal adjudication had been made, but examined the record of the petitioner's prior conviction of "auto theft, * * * a felony" committed in Utah in 1935, and the laws of Utah for the purpose of nullifying the habitual criminal adjudication and ordering petitioner's discharge from custody. For the reasons stated in my dissent in the Seeley case, I am of the opinion that the court in the Connell case went beyond the permissible scope of review on habeas corpus.

The Connell case was thereafter cited with approval and followed in In re Howard, 69 Cal.App.2d 164, 158 P.2d 408. In that case respondent questioned "the propriety of habeas corpus under the circumstances" but that question was apparently brushed aside without discussion, upon the authority of the Connell case and two cases involving direct attack upon appeal. The Howard case was in turn cited with approval in In re Kingsbury, 74 Cal.App.2d 959, 170 P.2d 82, but it appears possible that the court there confined the scope of review to the "face of the record" (74 Cal.App.2d at page 962, 170 P.2d at page 84). Both the Connell case and the Howard case were cited with approval in In re Thompson, 72 Cal.App.2d 747, 165 P.2d 533, but there the habitual criminal adjudication was not nullified as the court was dealing only with the *effect* of such habitual criminal adjudication in its relation to a *third* prior conviction of "larceny," a felony, in Wisconsin. Neither the Connell case nor the Howard case was cited in the recent case of In re Williams, 76 Cal.App.2d 161, 172 P.2d 558, but that decision does declare void a judgment adjudging the petitioner to be an habitual criminal, without discussion of the scope of review on habeas corpus. For the reasons stated herein as well as in my dissent in the Seeley case, I am of the opinion that these recent decisions of the District Courts of Appeal should be disapproved insofar as they hold or indicate that when habeas corpus is used to attack the *validity* of an habitual criminal adjudication, the scope of review may extend beyond the face of the record in the proceeding in which the habitual criminal adjudication was made.

The earlier case of In re Taylor, 64 Cal. App.2d 47, 148 P.2d 143, 144, is discussed in the majority opinion. No relief was given petitioner there even though the prior conviction under consideration was one for the crime of "Larceny, a felony," committed in North Carolina. The scope of review on habeas corpus was not discussed, but the court held that as the burden of proof was on the petitioner in a habeas corpus proceeding and as the petitioner had failed to sustain the burden, the writ should be discharged. That case is direct authority for denying any relief to petitioner here as he has wholly failed to show that the offense committed in Utah, and for which he suffered his prior conviction thereof "[grand] larceny, a felony," was not an offense within the purview of section 644 of the Penal Code or that it was not "an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison." Pen.Code, § 668.

It must be conceded that the habitual criminal laws have presented many perplexing problems to the courts and to others charged with the administration of our penal laws. Many of these problems arise because of the differences in the laws of the several states where the prior convictions have been had. In some states certain offenses are defined in a manner similar to offenses defined in our Penal Code but are given different names. In other states certain offenses which are given names similar to offenses specified in our Penal Code are defined as having somewhat different statutory elements. The present case presents a typical example. This state defines theft (Pen.Code, § 484) and divides the crime into two degrees (Pen.Code, § 486) known as grand theft (Pen.Code § 487) and petty theft (Pen. Code, § 488). In many other states the crime of "theft" is unknown as such but most states define a similar offense under the name of "larceny." The essence of the offense of theft or larceny is generally the unlawful taking of the property of another but the statutory definitions vary in the several jurisdictions. 32 Am.Jur. 886. Furthermore, some states provide for no degrees of larceny and make any larceny a felony. Other states divide larceny into two degrees, ordinarily distinguished by the names "grand larceny" and "petit larceny," and make the first a felony and the second a misdemeanor. Here again, however, the statutory distinctions between the two degrees differ. As stated in Wharton's Criminal Law, 12th Ed., volume 2, section 1098, "The variations under statute [as to degrees of larceny] are too numerous to be stated here."

This state now defines grand theft as the taking of certain specified property of any value, or the taking of certain other specified property "of a value exceeding $50" or the taking of other property generally "of a value exceeding two hundred dollars," or the taking of property of any value "from the person of another." Pen. Code, § 487. Research fails to disclose any other state which has a statutory definition of the crime of "grand theft" or of "grand larceny" which is substantially identical. It appears that many other jurisdictions make the dividing line between the felony and misdemeanor in this type of crime to depend on whether the value of the property taken exceeds $50. Assuming then, as was the case with petitioner here, that an accused is charged in this state with a prior conviction of "grand larceny, a felony" in Utah, where that crime is defined as having a value element different from the value element of the crime of "grand theft" as defined in this state, the question presented for determination is whether such prior conviction may ever be counted as a prior conviction of "grand theft" within the meaning of our habitual criminal law. Pen.Code, § 644.

As I read the majority opinions in this case and in the Seeley case, I am inclined to think that it is implied in said opinions that a conviction of "grand larceny" in Utah may, *under certain circumstances*, be counted in this state as such prior conviction. If this were not the rule, then an accused who had committed several offenses of "grand larceny" in Utah could never be adjudged an habitual criminal in this state by reason of such priors, even though property of great value had been taken in the commission of each of said offenses. Furthermore, any other rule would be contrary to the rule indicated by numerous decisions in this state including In re Taylor, supra, 64 Cal.App.2d 47, 148 P.2d 143; People v. Morrison, 26 Cal.App.2d 616, 80 P.2d 94; People v. Hayes, supra, 3 Cal.App.2d 59, 39 P.2d 213; People v. Pace, 2 Cal.App.2d 464, 38 P.2d 202; and People v. Shaw, supra, 137 Cal. App. 533, 30 P.2d 1031.

The doubt concerning the above mentioned implication arises by reason of several expressions used in said majority opinions. In the majority opinion herein, it is said that the examination of such prior conviction for the purpose mentioned requires "merely a consideration of documentary and record evidence"; that "In applying section 644 the courts of this state may take cognizance only of what has been lawfully adjudicated" in the other jurisdiction; that "any court in which it (the Utah prior conviction of grand larceny) is presented must look at once to Utah's definition of grand larceny to ascertain whether the conviction there of that offense is a conviction of a felony enumerated in our section 644"; and that "Here it affirmatively appears by the record that the prior Utah conviction alleged in the information and admitted by defendant is a conviction of an offense which, insofar as the adjudicated facts are concerned, is by California law a misdemeanor and, hence, constitutes no basis for habitual criminal adjudication." In the majority opinion in the Seeley case, it is said: "It is not the crime which a defendant may have committed in a sister state, but the crime of which he has been convicted therein, that determines his status under sections 644 and 668 of the Penal Code. The adjudicated elements of the offense must meet the requirements of the California law." But these doubts to which reference has been made seem to be dispelled by the implication in the majority opinion herein that a prior conviction of "grand larceny" in Utah is insufficient only where there is "Pleading and proof or admission of a conviction for grand larceny in Utah, *without more* * * *." (Emphasis added.) What "more" by way of pleading or proof may be required is not stated. In other words, the majority opinion fails to indicate the circumstances under which a prior conviction of "grand larceny" in Utah may ever be counted as a prior conviction for the purposes of our habitual criminal law.

The customary method of alleging "grand larceny" in Utah is no doubt exemplified by the Utah information which was filed against petitioner in 1924. The only required allegation regarding value in Utah was that the property taken had a value "in excess of $50.00." Any allegation of a higher value would have been an immaterial allegation. If the information had alleged that the property taken was of the value of $1,000, the Utah court would have properly informed petitioner on arraignment for plea that if he had taken property of a value in excess of $50, any dispute as to the value as between $50.01 and the higher value alleged in the information was wholly immaterial. Likewise, the Utah court would have properly instructed the jury to like effect in the event that there had been a conflict in the evidence on value at the trial. In case of either a plea of guilty or a verdict of guilty of "grand larceny" in Utah, the only fact "adjudicated" with respect to value would have been that the property had a value "in excess of $50.00" as required by the Utah statute. We therefore cannot content ourselves, as do said majority opinions, with talking of "adjudicated facts" or "adjudicated elements," for if we do, no prior conviction of "grand larceny" in Utah could ever be counted as a prior conviction in this state so long as there remains any difference whatever in the value element as required by the Utah definition of grand larceny and as required by the California definition of grand theft. While this last statement may be subject to qualification by virtue of the fact that under our present law the taking of particular classes of property, including automobiles, constitutes grand theft regardless of the value of such property (Pen. Code, § 487), it would necessarily be true as to Utah convictions for the taking of any property not falling within such particular classes. That such is not the rule in this state is clearly indicated by the authorities cited above.

It is true that a conviction in Utah for grand larceny might be either (1) for an offense involving property of a value of from $50.01 to $200 or (2) for an offense involving property of great value, perhaps of the value of $10,000 or more; and it is further true that in California an offense committed in this state and falling within the first class would be a misdemeanor only. Pen.Code, §§ 487, 488. It therefore appears that the crimes of grand larceny in Utah and grand theft in California are crimes which are similar but as to which the statutory definitions are not substantially identical. Under such circumstances it appears appropriate, when the prosecution relies upon a prior conviction of grand larceny in Utah, that the burden should be placed on the prosecution in the trial court to prove that the actual offense committed in Utah, and for which the accused suffered his felony conviction there, was an offense within the purview of sections 644 and 668 of the Penal Code. In such case, if the prosecution fails to assume the burden imposed upon it, then the accused has his remedy by way of a direct attack on appeal. But if a judgment adjudicating the accused to be an habitual criminal becomes final and the question is raised by the accused on habeas corpus, it is equally appropriate that the burden should be placed upon the accused in such proceeding in accordance with established rules. Assuming therefore that petitioner here is entitled to the widest latitude in his attack upon the *effect,* rather than upon the *validity,* of the habitual criminal adjudication, petitioner has made no showing whatever that the offense committed in Utah, and for which he suffered his conviction there in 1924, was *not* an offense within the purview of sections 644 and 668 of the Penal Code.

Reference is made in the majority opinion to certain language appearing in People v. McVicker, supra, 37 Cal.App.2d 470, 99 P.2d 1110, in which case an order denying this petitioner's motion to vacate the judgment adjudicating his habitual criminal status was affirmed. That was not a proceeding on habeas corpus and any language in that opinion which related to the relief that might be had in a proceeding on habeas corpus was obviously dictum. Under no theory could that language be controlling here and I believe that such language should be disapproved insofar as it may be said to be in conflict with the views expressed herein or in my dissent in the Seeley case.

For the reasons stated, I am of the opinion that the writ should be discharged and that the petitioner should be remanded to custody without any declaration by this court that petitioner "has been previously twice, but not three times, convicted of felonies enumerated in section 644 of the Penal Code."

EDMONDS and TRAYNOR, JJ., concurred.

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29 Cal.2d 403

Ex parte HARINCAR.

Cr. 4606.

Supreme Court of California, in Bank.
Dec. 10, 1946.

1. Criminal law 🔑1202(1)

In determining whether conviction in Minnesota of offense of grand larceny could constitute basis for an habitual criminal adjudication, it would be presumed that defendant suffered prior conviction for least offense punishable under Minnesota statute, in absence of showing of value of goods taken. Pen. Code, § 644.

2. Criminal law 🔑1202(1)

Where indictment under which petitioner was convicted in Iowa in 1920 charged larceny of goods of admitted value of $81, and at time petitioner was convicted of Iowa offense the California statute denominated grand larceny as the taking of property exceeding $50, prior Iowa conviction constituted basis for habitual criminal adjudication, notwithstanding that California statute was amended before petitioner's adjudication to require value of property taken to exceed $200 in order for offense to constitute a felony. Pen. Code, §§ 487, 644.

3. Habeas corpus 🔑23

A prisoner on parole remains constructively a prisoner and is not free from legal restraint by penal authorities, and habeas corpus is appropriate means for testing legality of that restraint.

4. Habeas corpus 🔑23

Petitioner, serving a life sentence as an habitual criminal, was not entitled to be released from restraint of parole, where Adult Authority recognized that, as a matter of law, at time of his conviction of primary offense petitioner had suffered two but not three previous convictions within purview of habitual criminal statute as it then read and released petitioner on parole. Pen. Code, § 644.

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Proceeding in the matter of the petition of Joseph Harincar for a writ of habeas corpus to secure his release from custody.

Writ discharged.

Joseph Harincar, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

By application for writ of habeas corpus petitioner attacks an adjudication that he is an habitual criminal. He contends that the trial court erroneously found that he had suffered three prior convictions of felony in other states, whereas two of the convictions were of offenses which, if committed in California, would be only misdemeanors. Under the authority of In re McVickers, Cal.Sup., 176 P.2d 40, and In re Seeley, Cal.Sup., 176 P.2d 24, if this contention can be upheld by reference to the judicially noticed law of the states in which the priors were suffered, or to authenticated copies of the informations and judgments of prior convictions, petitioner can secure relief in this proceeding. However, as hereinafter pointed out, it appears that petitioner is an habitual criminal with two prior convictions of felony, serving a life sentence, that he has been released on parole and, therefore, that he is entitled to no relief except a formal adjudication of his status.

Petitioner was accused by information of the crime of forgery committed in Los Angeles on July 16, 1936. The information alleged that he had been three times previously convicted of felonies in other states and had served a term of imprisonment in a state prison for each conviction. Petitioner pleaded guilty to the charge of forgery and admitted the prior convictions as alleged. Counsel for petitioner stated to the trial court that the crimes of which petitioner had been previously convicted "were nothing but petty larcenies under our laws." As to one of the priors this statement is correct. The judgment of the trial court, entered on October 1, 1936, recited the three asserted prior convictions and adjudged that petitioner was an habitual criminal and that he should be imprisoned in the state prison at Folsom for the term of his natural life.

The three prior convictions alleged, admitted as charged, and recited in the judgment are of "Larceny, a felony," in Iowa on March 10, 1920; of "Receiving Stolen Property, a felony," in Minnesota on September 16, 1925; and of "Grand Larceny and Prior Conviction of Felony, a felony," in Minnesota on February 4, 1928. In 1936, when petitioner committed and was convicted of the primary felony of forgery, section 644 of the Penal Code (as am. Stats. 1935, p. 1699) provided that "Every person convicted in this State of any felony who shall have been previously twice convicted [of enumerated felonies, including grand theft and feloniously receiving stolen goods] upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years. Every person convicted in this State of any felony who shall have been previously three times convicted [of enumerated felonies, including grand theft and feloniously receiving stolen goods], upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison * * * shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole * * *."

After the time for appeal had expired petitioner moved the trial court to vacate the *judgment of conviction.* He apparently did not distinguish between the formal judgment of conviction and the ancilliary determination (affecting not guilt but only length of imprisonment and eligibility to parole) of habitual criminal status. In pressing the motion to vacate the judgment of conviction, however, he contended, as he does in this proceeding (and as he had at the trial), that the two convictions of crimes denominated "Larceny" adjudicated only that he had committed acts which, if committed in this state, would be petty theft. His motion was denied, he appealed, and the order denying the motion was affirmed on the authority of People v. Lumbley, 1937, 8 Cal.2d 752, 760, 68 P.2d 354, and People v. Moore, 1935, 9 Cal.App.2d 251, 255, 49 P.2d 615. People v. Harincar, 1942, 49 Cal.App.2d 594, 121 P.2d 751. The attack in the proceeding now before us is not upon the judgment of conviction but is directly and exclusively levelled at the subsidiary determination of habitual criminal status.

[1] Petitioner concedes that the second alleged prior conviction ("Receiving Stolen Property" in Minnesota) was of a crime which is in substance the same offense as the crime denominated "feloniously receiving stolen goods" in section 644 of the Penal Code.[1] Since the commencement of this proceeding respondent has conceded that the third alleged prior conviction ("Grand Larceny" in Minnesota in 1928) was not of an offense which, if committed in this state, would constitute a felony enumerated in section 644.[2]

[2] The first alleged prior conviction, as stated above, was of "Larceny, a felony," in Iowa in 1920. The applicable Iowa statute (Iowa Code, 1897, § 4831) provided that "If any person steal, take and carry away of the property of another any money, goods * * * [etc.], he is guilty of larceny"; larceny of property of value more than $20 was a felony punishable by imprisonment in the penitentiary; larceny of

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[1] In 1925, when petitioner suffered this prior conviction, whether the California crime denominated "receiving stolen goods" was a felony depended upon the punishment imposed. (Pen.Code, § 496 [Stats. 1907, p. 301].) Petitioner, then an adult who (as hereinafter appears) had been previously convicted of felony, was punished by imprisonment in the Minnesota state reformatory. It is not disputed that "the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein" determines the status of the reformatory as a "state prison" within the meaning of section 644 of our Penal Code. In re Gilliam, 1945, 26 Cal.2d 860, 863, 161 P.2d 793, 795.

[2] In Minnesota the offense denominated "grand larceny" was divided into degrees; to "steal or unlawfully obtain * * * property of any value by taking the same from the person of another" *or from a building* was grand larceny of the second degree. (Minn.Gen.St., 1923, § 10363.) In the absence of other proof the trial court was bound to assume that petitioner suffered the prior conviction for the least offense punishable under the statute. In admitting the prior *as charged* petitioner, of course, admitted no more than *was charged.* In re McVickers, Cal.Sup., 176 P.2d 40; People v. Lohr, 1938, 28 Cal. App.2d 397, 399, 83 P.2d 615; People v. McChesney, 1940, 39 Cal.App. 2d 36, 41, 102 P.2d 455. The essential elements of such offense are not necessarily those of the California crime of "grand theft" (property of value exceeding $200 [Pen.Code, § 487]). And from the record before us (including copies of the Minnesota information and judgment) it appears that petitioner was charged with, admitted, and was convicted of the unlawful taking from a building of property of a value of only $6.20.

property of value less than $20 was a misdemeanor punishable by fine and imprisonment in the county jail. From the record before us (including copies of the Iowa indictment and judgment) it appears that petitioner was specifically charged with and convicted of larceny of certain described goods of the alleged and admitted value of $81. At the time petitioner committed and was convicted of the Iowa offense (1920), the California offense denominated "grand larceny" was committed "When the property taken is of a value exceeding fifty dollars." (Pen. Code, § 487 [Stats. 1919, p. 235]. In 1923 section 487 was amended [Stats. 1923, p. 271] to increase the monetary dividing line between grand and petty larceny to $200.) It thus appears that in Iowa petitioner was charged with and convicted of an offense the adjudicated elements of which met or extended the minimum essentials of the then California crime of grand larceny, but which adjudicated elements do not meet or exceed the requirements of the present California crime of grand theft.

The problem, therefore, is substantially the same as if petitioner were contending that a convicton of grand larceny of $81 in California in 1920 is not, since the 1923 amendment of section 487 of the Penal Code, a proper basis for adjudication of habitual criminality. Such a contention was rejected in People v. McConnell, 1937, 20 Cal.App.2d 196, 197, 66 P.2d 720, where the District Court of Appeal said, "section 644 of the Penal Code, contains no provision that the prior felony must be such an offense at a subsequent date of prosecution. The date of conviction, therefore, is the time to be considered in determining whether or not the offense was a felony at the subsequent trial." The New York law is similarly construed. (People ex rel. Kruger v. Snyder, 1941, 261 App.Div. 352, 25 N.Y.S.2d 644.) (And the rule appears to be the same where the statute making the prior conduct criminal has been repealed at the time of the commission and conviction of the subsequent, primary offense. People v. Barwick, 1936, 7 Cal.2d 696, 699, 62 P.2d 590; In re Jerry, 1940, 294 Mich. 689, 293 N.W. 909, 132 A.L.R. 89.)

[3, 4] It therefore appears that petitioner at the time he was convicted of the primary crime of forgery was an habitual criminal who had been twice, not three times, previously convicted of felonies enumerated in section 644 of the Penal Code. After this proceeding was instituted section 644 of the Penal Code was amended and section 3048.5 was enacted. (Stats. 1945, p. 1747). The latter section provides that one who has been adjudged an habitual criminal prior to its enactment, whether twice or three times previously convicted, and who has been convicted of a primary offense other than certain felonies (of which certain felonies forgery is not one) enumerated in section 644 as amended, "shall be deemed to be imprisoned for life and shall be eligible for release on parole after he shall have served a minimum term of seven calendar years." Pursuant to the authorization of this section petitioner has been released on parole. Since petitioner remains "constructively a prisoner * * he is not free from legal restraint by the penal authorities and habeas corpus is the appropriate means for testing the legality of that restraint. [Citations.]" (In re Marzec, 1945, 25 Cal.2d 794, 797, 154 P.2d 873.) But the application of section 3048.5 of the Penal Code to one whose primary offense is forgery is the same, whether he has suffered two or three prior convictions. Petitioner, serving a life sentence, is not entitled to be released from the restraint of parole. It appears that the Adult Authority has recognized that, as a matter of law, at the time of his conviction of the primary offense petitioner had suffered two but not three previous convictions within the purview of section 644 as it then read.

As petitioner appears to have been accorded every right to which he has shown himself entitled, the writ is discharged and he is remanded to the custody of the Adult Authority, subject to his status on parole.

GIBSON, C. J., and SHENK and CARTER, JJ., concurred.

SPENCE, Justice (concurring).

I concur in the judgment remanding petitioner "to the custody of the Adult Authority, subject to his status on parole." I further agree with the conclusions that "Petitioner, serving a life sentence, is not entitled to be released from the restraint of parole," and that he has "been accorded every right to which he has shown himself entitled."

When petitioner commenced this proceeding on habeas corpus, he was not on parole but was serving a life sentence in the state prison as an habitual criminal. Since the commencement of this proceeding, he has been released on parole under the authority of section 3048.5 of the Penal Code, enacted in 1945. Stats. 1945, ch. 934, p. 1747. The effect of that section was to make petitioner eligible for parole after serving seven years, regardless of whether he had suffered two or three prior convictions. As petitioner is now unquestionably eligible for parole under the provisions of that section and as he has been released on parole pursuant thereto, it appears unnecessary to determine, as the majority opinion purports to do, what may have been the *effect* of the judgment of the trial court upon his eligibility for parole under the law applicable prior to the enactment of section 3048.5.

Petitioner, however, originally sought, and still seeks by this proceeding on habeas corpus, to nullify the portion of the judgment adjudicating his status as an habitual criminal. As it does not affirmatively appear from the face of the record in the criminal proceeding in which the habitual criminal adjudication was made that the trial court was without jurisdiction to make such adjudication, I believe petitioner should be denied such relief for the reasons stated in my dissenting opinions in In re McVickers, Cal.Sup., 176 P.2d 40, and In re Seeley, Cal.Sup., 176 P.2d 24. While the majority opinion denies such relief, I believe that the majority opinion should have confined the inquiry to the face of the record in the criminal proceeding in arriving at the conclusion that petitioner was not entitled thereto.

EDMONDS and TRAYNOR, JJ., concurred.

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77 Cal.App.2d 629

AUTO LITE BATTERY CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13283.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1947.

1. Workmen's compensation ⚷794

An employer may so limit the scope of employee's duties that if he steps outside the scope of such duties and undertakes to perform work which he is not employed to do, he is not acting within the "scope of his employment" within Workmen's Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Scope of Employment".

2. Workmen's compensation ⚷793

Doing an act within the scope of employment in a manner forbidden by employer does not take employee out of the "scope of his employment" so as to deprive him of workmen's compensation benefits.

3. Workmen's compensation ⚷945

Provision in Workmen's Compensation Act for reducing by one-half compensation for any injury caused by wilful misconduct of injured employee must be liberally construed in favor of employee. Labor Code, §§ 3202, 4551.

4. Workmen's compensation ⚷1602, 1675

Evidence established that workman whose duties included carrying parts from storeroom was acting within scope of his employment so as to be entitled to compensation for injuries sustained while using electric truck to transport such parts, though expressly forbidden to operate truck, but that such violation of orders constituted serious and wilful misconduct justifying reduction of award by 50 per cent. Labor Code, § 4551.

◆

Proceeding under the Workmen's Compensation Act by Albert Pennella, claimant, opposed by Auto Lite Battery Corporation of California, employer, and another. The employer and another seek by writ of review to annul an award of the Industrial Accident Commission of the State of California granting compensation.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

R. C. McKellips, of San Francisco, for respondent Industrial Accident Commission.

DOOLING, Justice.

Petitioners seek to annul an award of the Industrial Accident Commission in favor of Albert Pennella. Pennella, a minor 20 years of age, was employed by petitioner, Auto Lite Battery Corporation of California. He worked on an assembly line placing elements in battery cases. The parts which Pennella and his fellow workers on the assembly line used in their work were customarily brought from the storeroom by a small electric truck. A driver was employed to operate this truck and Pennella had been at least twice specifically forbidden by his foreman to operate it. Pennella testified that when just a few parts were lacking for their work on the assembly line "I usually go up and carry them back", and that on such occasions he carried them by hand. On the date of his injury Pennella, after a rest period, placed some parts which were needed to continue his work on the electric truck and, in express violation of the orders previously given him, got on the truck and drove it to the assembly line. In attempting to get off the truck at the assembly line he accidentally started it and was crushed between the truck and the wall, receiving the injuries to his leg which resulted in the award under attack.

The respondent commission after first denying compensation granted a rehearing and made an award to Pennella, finding that he "sustained injury arising out of and in the course of his employment", but that "said injury was caused by the serious and wilful misconduct of said employee, in that he knowingly and intentionally violated an express order of his employer to the effect that he was not to operate the electric truck which caused his injury." By reason of this finding of the employee's misconduct the award of compensation was reduced 50%. Labor Code, § 4551.

Petitioners attack the award on the ground that in operating the truck in violation of the orders expressly given him Pennella stepped outside the scope of his employment and that the award for that reason is not justified.

[1] It is well settled in this state that an employer may so limit the scope of an employee's duties that if he steps outside the scope of those duties and undertakes to perform work which he is not employed to do he is not acting within the scope of his employment. San Francisco & S. Railway Co. v. Industrial Acc. Comm., 201 Cal. 597, 258 P. 86; Sherer & Co. v. Industrial Acc. Comm., 175 Cal. 615, 166 P. 318; Williamson v. Industrial Acc. Comm., 177 Cal. 715, 171 P. 797; Ruff v. Industrial Acc. Comm., 123 Cal.App. 168, 11 P.2d 17.

[2] These cases are not, however, necessarily controlling here. From the testimony the respondent commission was entitled to conclude that the bringing of parts by hand from the store room to the assembly line was within the scope of Pennella's duties. The distinction to be observed is that between doing an act entirely outside the scope of employment and doing an act within the scope of employment in a forbidden manner. This distinction is well expressed in Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N.W. 895, cited by our supreme court in Associated Indem. Co. v. Industrial Acc. Comm., 18 Cal.2d 40, 47, 112 P.2d 615. In the Prentice case an employee whose duty it was to load and unload boxes onto and from a moving conveyor was injured while riding on the conveyor to the point where his duties called him. The industrial commission found that he had been forbidden to ride on the conveyor but nevertheless made an award of compensation. In affirming the award the supreme court of Minnesota said: "It is the contention of the relators that the respondent violated an

instruction limiting the sphere of his employment and that therefore his accident did not arise out of and in the course of his employment. We are unable to agree with the relators in their contention. Violation of orders or directions does not defeat compensation unless such violation takes the employee out of the sphere or scope of his employment. Rautio v. International Harvester Co., 180 Minn. 400, 231 N.W. 214, and cases cited in the paragraph numbered 4 in that opinion. Here the employee was doing exactly what he was hired to do at the very place where he was required to perform his duties but in a manner forbidden by his superiors. This transgression was wholly within the sphere of employment and consequently does not prevent the recovery of compensation. Under such conditions the extra hazard to which he thus exposed himself did not affect the employer's liability."

The same distinction was followed in Ricci v. Katz, 267 App.Div. 928, 46 N.Y.S. 2d 781, leave to appeal to the court of appeals denied, 293 N.Y. 937, 55 N.E.2d 757, where the court said [267 App.Div. 928, 46 N.Y.S.2d 782]:

"Claimant was employed as a laborer on a farm. While working with two other men collecting stones and placing them in a small wagon attached to a tractor, he started to drive the tractor to dump the stones. The tractor overturned, threw the claimant off and fell on him causing his injuries. The claim was contested on the ground that he had been forbidden to operate the tractor. After instructing claimant and the others to remove the stones, the foreman had told him not to operate the tractor and then had left the scene of the work. While the foreman was away claimant was in charge and when the wagon was filled decided to operate the tractor himself rather than remain idle and await return of the foreman.

"The use of the tractor was but an incident in the principal job of removing and carting away the stones. Claimant performed his work in a forbidden manner, rather than performing work which had been forbidden."

Similar holdings based on the distinction noted will be found in Dubit v. Sheffield Farms Co., 118 N.J.L. 411, 193 A. 546; Standard Elkhorn Coal Co. v. Stidham, 242 Ky. 228, 46 S.W.2d 120; Frint Motorcar Co. v. Industrial Commission, 168 Wis. 436, 170 N.W. 285; Wallace v. Rex Fuel Co., 216 Iowa 1239, 250 N.W. 589; Moss v. Hamilton, 234 Ala. 181, 174 So. 622; Omaha Boarding & Supply Co. v. Industrial Commission, 306 Ill. 384, 138 N.E. 106. See the notes in 119 A.L.R. 1409; 83 A.L.R. 1211; 58 A.L.R. 198; 26 A.L.R. 166; 23 A.L.R. 1161; and cf. McAdoo v. Industrial Acc. Comm., 40 Cal. App. 570, 181 P. 400.

[3] Formerly our workmen's compensation act denied the employee compensation for any injury caused by his wilful misconduct. Pacific Coast Casualty Co. v. Pillsbury, 31 Cal.App. 701, 162 P. 1040; 27 Cal.Jur. 428. In 1917 the more lenient rule making such misconduct a ground for reducing compensation by one-half was adopted. Workmen's Compensation Act of 1917, sec. 5 (4), Stats.1917, p. 834. This, like all provisions of the act, is to be liberally construed in favor of the employee. Pacific Lumber Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892; Labor Code, sec. 3202.

[4] We are satisfied that the commission was justified in concluding that Pennella was acting within the scope of his duties in bringing parts to the assembly line, but was performing this duty in a forbidden manner in using the truck, and was for that reason guilty of serious and wilful misconduct justifying the reduction of the award of compensation by 50%. Labor Code, § 4551; McAdoo v. Industrial Acc. Comm., supra, 40 Cal.App. 570, 181 P. 400.

The award is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

77 Cal.App.2d 645

In re HINDS' ESTATE.

PFINGST v. GOETTING.

Civ. 13220.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1947.

1. Executors and administrators ⚷17(7)

Where deceased's niece was duly appointed administratrix on nomination of deceased's sister, order thereafter appointing deceased's nephew as joint administrator with niece was erroneous in view of statutory provision that if person requesting administration is a sister of deceased, the nominee shall have priority next after those in the class of persons making the request. Probate Code, § 423.

2. Executors and administrators ⚷17(1)

Where right of priority for appointment as administrator is given by statute, no discretion is left to the court to choose some other party not qualified under the statute. Probate Code, § 423.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Annie Hinds, deceased, wherein Margaret Goetting Pfingst was appointed administratrix, and wherein Gaston I. Goetting filed an application to have the appointment set aside and for an order appointing him as administrator. From an order appointing both Margaret Goetting Pfingst and Gaston I. Goetting as joint administrators, Margaret Goetting Pfingst appeals.

Order reversed.

Hilary H. Crawford, of San Francisco, for appellant.

Dreher, McCarthy & Erickson, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Annie Hinds died intestate a resident of the City and County of San Francisco. She left as heirs Florence Morgan, a sister, a niece and nephew who were both the children of a deceased sister, and four grandnieces and nephews. The niece of deceased, the appellant herein, was duly appointed administratrix upon the nomination of Mrs. Morgan. The nephew, the respondent herein, then filed an application to have the appointment set aside and for an order appointing him as administrator. Several hearings were had, the details of which are not important to this decision. They resulted in an order appointing the nephew and the niece as joint administrators on findings that both were competant.

On her appeal from this order the appellant raises several points which do not require consideration because the case rests on the settled rule that the appellant alone is entitled to the letters of administration as a matter of law.

Section 423 of the Probate Code Annotated reads: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in court. If the person making the request is a child, grandchild, parent, brother or sister of the decedent, *the nominee shall have priority* next after those in the class of the person making the request; *otherwise* the court, in its discretion, may appoint either such nominee or a person of a class subsequent in rank to that of the person making the request; but other persons of the class of the person making the request shall have priority over such nominee." (Emphasis ours).

[1, 2] In a case identical in its facts and circumstances the court in Re Estate of DeBrum, 26 Cal.App.2d 319, 321, 322, 79 P.2d 414, resting its decision partly on In re Estate of Somerville, 12 Cal.App.2d 430, 55 P.2d 597, held that "* * * we here express our accord with the view expressed in the Somerville Case that, prima facie, the nominee of a sister of a decedent, if the sister succeeds to any part of the decedent's estate, is now entitled, *as of right and not as a matter of the court's discretion,* to be preferred to a nephew, even though the nominee have no right to any part of the estate while the nephew is entitled to share in it or some part of it." [26 Cal.App.2d

319, 79 P.2d 416] (Emphasis ours.) The supreme court denied a transfer in both cases and this interpretation of the statute must be accepted as controlling. Under this rule the appellant, as nominee of the sole surviving sister and next of kin, comes under the fifth class of those entitled to letters under section 422, Probate Code Annotated. The respondent, as descendant of a deceased sister, comes under the sixth class of the section. Section 423 declares that appellant as nominee of one in the higher class "Shall have priority" of those of the subsequent classes. When such right is given by statute no discretion is left to the court to choose some other party not qualified under the statute.

Order reversed.

GOODELL and DOOLING, JJ., concur.

WEST KEY NUMBER SYSTEM

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77 Cal.App.2d 535

In re MALGOR'S ESTATE.

LA CABE v. MALGOR et al.

Civ. 15216.

District Court of Appeal, Second District, Division 3, California.

Jan. 6, 1947.

1. Executors and administrators 🔑122(3)

The superior court, in settling account of special administrator, appointed by court to take charge of decedent's funeral and charge his estate therewith, where no one entitled under statute to custody of decedent's remains for purpose of interment was available, had jurisdiction to allow such administrator credit for funeral expenses. Health and Safety Code, § 7111; Probate Code, § 463.

2. Executors and administrators 🔑109(2)

The executor or administrator of decedent's estate owes duty to attend to decent and proper interment of decedent's remains in manner suitable to his estate and station in life, and reasonable and judicious expenditure for such purpose will be allowed in settlement of such representative's account. Health and Safety Code, § 7101.

3. Executors and administrators 🔑109(2), 413

The amount allowed administrator of decedent's estate for expenses of decedent's funeral and monument should be governed by custom of people of like rank and condition in society, but distinction is made between solvent and insolvent estates. Health and Safety Code, § 7101.

4. Executors and administrators 🔑109(2)

The fact that services and merchandise, furnished by undertaker conducting decedent's funeral, were reasonably worth amount charged therefor, is not sufficient reason for allowing administrator's claim for such amount on accounting. Health and Safety Code, § 7101.

5. War 🔑12

The Alien Property Custodian, representing decedent's heirs residing in foreign enemy-occupied country, owed duty to object to undertaker's claim against decedent's estate for funeral expenses in excessive amount.

6. Executors and administrators 🔑109(2)

An undertaker's claim against decedent's estate for nearly 15 per cent. of net amount thereof as funeral expenses, including $2,500 for solid cast-iron casket with ivory velvet tailored interior, was grossly excessive, considering decedent's manner of living alone in trailer while traveling with his sheep, his station in society, and condition of estate, so as to require reduction of amount thereof in settlement of special administrator's estate. Health and Safety Code, § 7101.

7. Executors and administrators 🔑504(1)

In settlement of administrator's account, superior court, of its own motion, should disallow unreasonably large claims for decedent's funeral expenses.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

In the matter of the estate of Gaston Malgor, deceased. From an order allowing, settling, and approving the first and final account of Barnard LaCabe, as special administrator of the estate, Barnard Malgor and others, contestants, appeal.

Modification of order by reduction of the amount allowed for decedent's funeral expenses directed, if the special administrator files written consent thereto within specified time, and, otherwise, order reversed.

J. V. McDermott, of Los Angeles, and Emmet B. Hayes, of San Francisco, for appellants.

Vetran Ricca, of Los Angeles, for respondent Barnard Lacabe.

Harold W. Kennedy, Co. Counsel, and John Wright, Deputy Co. Counsel, both of Los Angeles, for respondent Ben H. Brown.

PER CURIAM.

Gaston Malgor died intestate on September 9, 1944, survived by a brother, a sister, a half-brother, and a half-sister, who were citizens and residents of France. On September 11, 1944, Barnard LaCabe, a friend of decedent, was appointed special administrator of decedent's estate. The order so appointing him recited, among other things, that he was appointed "to take charge of the funeral of the deceased and charge the estate therewith."

He arranged for the funeral with the undertaking firm of Godeau and Martinoni, which firm performed the undertaking services. On September 26, 1944, that firm filed a creditor's claim with the special administrator for $3101, which amount included $2500 for a casket. He approved the claim on September 27th. On January 4, 1945, the public administrator was appointed administrator. The special administrator filed his final account on February 20, 1945, reciting therein, among other things, that he had made the arrangements for the funeral, that he had approved the undertakers' claim, that he claimed credit for the amount thereof, and prayed that the account be allowed and that he be ordered to pay the claim.

Objections to the account were filed on behalf of the brothers and sisters of decedent by a member of the California Bar, who was designated by the Alien Property Custodian of the United States to represent them, they being citizens and residents of France and at that time being in enemy-occupied territory. The objections were made upon the grounds that the claimed credit of $3101 for funeral expenses was in excess of the standard of living adopted by the decedent, was disproportionate to the value of the estate, and was unreasonable. The court allowed, settled, and approved said account. The objectors, through the attorney designated by the Alien Property Custodian to represent them, appeal from the judgment.

[1] They contend that the court is without jurisdiction to allow credit for funeral expenses in the final account of a special administrator. They state that under the provisions of Section 463 of the Probate Code the powers of a special administrator are limited to taking possession of and preserving the estate, selling perishable property, and borrowing money. They argue that the probate court is without authority to enlarge upon the powers conferred by the code. It is to be noted that said Section 463 also provides that a special administrator may "exercise such other powers as are conferred upon him by his appointment." His appointment, as above shown, conferred upon him power to take charge of the funeral and charge the expenses of it to the estate. At the time the special administrator was appointed, it appears that no person who was entitled, under Section 7111 of the Health and Safety Code, to the custody of the remains for the purpose of interment was available to take charge of the funeral, and it was necessary that someone be authorized to perform that duty. Appellants concede that the court acted within its jurisdiction in appointing the special administrator to take charge of the funeral, but they contend that the court did not have jurisdiction to allow him credit for any expenses incurred pursuant to the authority conferred upon him by the court. The conferring of power to incur funeral expenses should include also the right to obtain credit therefor. The court, in addition to having jurisdiction to authorize him to take charge of the funeral, had jurisdiction to authorize him to charge the estate

with the expenses thereof. He acted under the power so conferred upon him. The court had jurisdiction, in settling the account of the special administrator, to allow him credit for funeral expenses.

Appellants contend further that the sum claimed for funeral expenses is unreasonable, disproportionate and not in keeping with decedent's standard of living. Decedent's estate consisted of $21,520.25 in cash, and $1,900 in United States Savings Bonds, making a total of $23,420.25 in cash and bonds. The total credits of the special administrator, not including the undertaker's charge, amounted to $479.72. Therefore, the net amount of the estate before the claim of the undertakers had been allowed by the special administrator but had not been presented to a judge for approval prior to its presentation in the account. It was itemized as follows:

"Estate of Gaston Malgor, deceased,
"To Godeau & Martinoni, Dr.
1944

Sept. 26	To solid cast iron metal casket with ivory velvet tailored interior	$2,500.00
	Professional services and care of remains:	
	Coroner fee pd by us	15.00
	Shaving	1.00
	Bathing of body.....	5.00
	Dressing	5.00
	Cosmetics and manicure	5.00
	Treatment of Tissue Gas	50.00
	Casketing of body....	10.00
	Additional care 3 days	15.00
	Ambulance to Coroner's office	5.00
	Candles	5.00
	Gloves and boutonniers for pallbearers..	12.00
	Funeral notices in Times, Examiner, Herald	24.00
	Organist and soloist at Rosary and Funeral..	25.00
	Auto for clergyman, Rosary and Funeral..	11.00
	Limousine Service Funeral	11.00
	Burial Permit Fee...	1.00
	Arrangement of Flowers at Rosary and Funeral	10.00
	Cartage of Flowers to Cemetery	11.00
	Memorial Records, including printing.....	10.00
	Memorial books & register	7.50
	Use of slumber room, chapel & equipment..	50.00
	Funeral Direction, including director and 4 assistants	100.00
	Motorcycle escort....	5.00
	Auto to Puente & return	17.50
	Telegram	2.00
	Notification to Aunt, Cousin & out-of-town partners	15.00
	Auto & Driver at disposal of Administrator	25.00
	Clothing: Undershirt, Shorts, Shirt, Tie socks & Shoes......	14.00
	Suit	35.00
	Vault	61.50
	Calif. State Sales Tax	37.50
		$3,101.00"

Other expenses of the funeral were $245.00 for a grave and interment, $35.87 for a casket spray.

Section 7101 of the Health and Safety Code reads as follows: "When any decedent leaves an estate in this State, the reasonable cost of interment and an interment plot of sufficient size to constitute a family plot and memorial, including reasonable sums for either, or both, general and special perpetual care of the plot proportionate to the value of the estate and in keeping with the standard of living adopted by the decedent prior to his demise, together with interest thereon from the date of interment, shall be considered as a part of the funeral expenses of the decedent and shall be paid as a preferred charge against his estate as provided in the Probate Code. * * *."

[2-4] It is the duty of the executor or administrator to attend to a decent and proper interment of the remains of his decedent in a manner suitable to his estate and station in life; and a reasonable and judicious expenditure for this purpose will always be allowed. "The amount allowed for the expenses of the funeral and the monument should be governed by the custom of people of like rank and condition in society; a distinction being made in this respect, however, between solvent and insolvent estates." In re Weringer's Estate, 100 Cal. 345, 34 P. 825, 826. The fact that the services and merchandise may have been of the reasonable value of the charge made therefor is not a sufficient reason for allowing the claim. Golden Gate Undertaking Co. v. Taylor, supra, 168 Cal. 94–101, 141 P. 922, 52 L.R.A.,N.S., 1152, Ann. Cas.1915D, 742. In the application of these rules the courts have consistently withheld approval of excessive claims for funeral expenses. Foley v. Brocksmit, 1903, 119 Iowa 457, 93 N.W. 344, 60 L.R.A. 571, 97 Am.St.Rep. 324; Burgess & Walter v. Thomas' Adm'r, 1937, 219 Ky. 399, 292 S. W. 1085; Wiles Bros. & Co. v. Wynne et al., 1918, 139 Tenn. 397, 201 S.W. 515; In re Kiernan, 1902, 38 Misc. 394, 77 N.Y.S. 924; In re Primmer's Estate, 1906, 49 Misc. 413, 99 N.Y.S. 830.

[5, 6] It was the duty of the Alien Property Custodian, representing the heirs of decedent, to object to the claim of the undertakers. The amount claimed was, in our opinion, grossly in excess of what would have been a fair and reasonable expense of funeral services and burial of the decedent, considering his manner of living, his station in society, and the condition of his estate.

The special administrator should have considered these conditions and arranged a funeral that would have been suitable to the manner in which Mr. Malgor had lived. He apparently disregarded them entirely and also was unmindful of his duty to save the estate from unnecessary expense. The fact that he presumably acted in good faith does not alter the situation. The undertakers who sold their services and merchandise should have known the limitation which the law places upon the authority of an executor or administrator in arranging funerals. They should not have extended credit for an extravagant funeral. It may be presumed that a man expects to be accorded a funeral in keeping with the manner in which he has lived. If he has other wishes he may express them. Mr. Malgor gave no directions either written or oral. Nothing was brought forward to indicate that he would have desired an elaborate and expensive funeral. It was not justified by the manner in which he had lived. His life in a trailer in the Imperial Valley was not one of ease or elegance. He had to cook for himself as he traveled with his sheep and he chose the hardship of that life in preference to a more comfortable existence. He accumulated his small fortune by hard work and frugality. A witness for the undertakers testified that the special administrator had told him that Mr. Malgor was fond of the better things of life, as if this fact alone justified his burial in a $2,500 solid cast iron casket with ivory velvet tailored interior. But the better things of life which he enjoyed, so far as shown by the record, were a room in a hotel at a dollar a day, when he came to Los Angeles, and a meal costing a dollar and a quarter. These were, in fact, the better things of his simple life, but they did not indicate a desire that he be laid away under the auspices of a funeral director with four assistants at a cost of $100. His social standing was fixed by the manner in which he lived. Being isolated from the associations which men usually enjoy, he held no position in the social or political scale which called for an ostentatious and costly funeral. The thought that was given to the matter of expense appears to have run, not in the direction of effecting any saving, but in the opposite direction. If $2,500 was a reasonable sum to expend for a cast iron casket for the remains of the frugal Mr. Malgor, what would have been an unreasonable sum? It was quite necessary that the body be placed in the casket (for which the charge was only $10) but we cannot see that it was necessary for the special administrator to have a car and driver at his disposal at a cost to the estate of $25. Other items might be pointed out which indicate that the special administrator and the undertakers were not concerned as to whether the charges that were being levied against the estate were in a reasonable amount. The rights of the absent heirs appear to have been given no consideration. The cost of this lavish interment amounted to slightly less than 15% of the net estate. The cost of a decent and appropriate funeral is a proper charge against the estate, however small, but there were no circumstances in the present case which justified the appropriation of 15% of the estate for that purpose. The heirs in France, who will bear the cost, eventually, were not consulted. Even if they had been fully advised as to their rights, and had consented to the arrangements, they would have been without authority to bind the estate.

[7] The court should of its own motion take action to disallow unreasonably large claims for funeral expenses. The relatives of a decedent would naturally be reluctant to offer objections, even though the amount charged was manifestly excessive. If there is to be extravagance, such as we see running throughout the claim in question, it must be at the expense of those who insist upon it. The estate may not be charged with it.

We are not unmindful of the fact that funeral arrangements are usually made by the family and relatives to whom the estate of the deceased will pass and who will ultimately bear the expense. Due consideration should be given to their judgment as to what would be a suitable funeral, although the court must exercise independent judgment as to what would be a reasonable expense. But where an administrator or executor acts entirely upon his own responsibility he should be careful to involve the estate in no unnecessary expense in arranging a suitable funeral. Burial expense of three hundred dollars is allowed under the Workmen's Compensation Law. While this does not set a standard for the allowance of claims in probate, each case depending upon the considerations which we have mentioned, it is a recognition of the fact that a decent burial may be had for three hundred dollars.

It is ordered that if the special administrator, Barnard Lacabe, shall, within 10 days after the filing of this opinion, file with the clerk of this court written consent to the modification of the order approving his first and final account as special administrator, so as to approve the claim of the undertakers for $750 and credit the special administrator with the sum of $750, instead of the sum of $3,101, for funeral expenses of decedent, the superior court will be directed to modify said order accordingly, and that if said written consent to modification be not filed within said time, the order settling said first and final account will be reversed, appellants in either event to recover costs.

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77 Cal.App.2d 667

In re MESNER'S ESTATE.

CRADICK v. REICH et al.

Civ. 15018.

District Court of Appeal, Second District,
Division 3, California.
Jan. 17, 1947.

1. Wills 🔑166(1)

Evidence justified finding that will was procured by exercise of undue influence on testatrix by her half-brother.

2. Wills 🔑155(1)

Undue influence that will invalidate a will may be exercised by insistent importunity carried to such an extent that it destroys free agency, overcomes testator's will without convincing his judgment, and brings about execution of a will which expresses the desires of the person exerting the "undue influence", rather than those of testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

3. Wills 🔑386

On appeal by contestants from order granting proponent a new trial and on cross-appeal by proponent from judgment refusing probate of will, judgment for contestants could be reversed only if supporting evidence on issues of undue influence and fraud was so deficient as to render a new trial unnecessary and to require a direction that will be admitted to probate.

4. Wills 🔑337

Where jurors on voir dire examination replied in the negative when asked whether they knew any reason why they could not render an impartial verdict and if they had more than a courtroom acquaintance with any of the counsel in will contest, and thereafter one of the jurors in jury room stated that he had been informed attorney who drew up will in question and offered it for probate could not be believed because he had acted as attorney for the underworld and big gamblers, proponent was properly granted a new trial. Code Civ. Proc. § 657, subds. 1, 2.

5. New trial 🔑20

Intentional concealment by a juror during his voir dire examination of a state of mind that would prevent his acting impartially is "misconduct" constituting an irregularity for which new trial may be granted under statute. Code Civ.Proc. § 657, subds. 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

6. New trial 🔑143(2)

Affidavits of jurors may be received, under exception to general rule, as to occurrences during the trial and deliberations of the jury, tending to prove existence of prejudice in the mind of a juror, that would prevent his acting as an impartial juror, where the state of mind is charged to have been entertained and to have been intentionally concealed during his voir dire examination.

7. Wills 🔑337

Proponent of will, by failing to inquire on voir dire whether jurors had heard anything derogatory to parties or their counsel, was not precluded from obtaining new trial because juror on voir dire replied in negative to question whether he knew of any reason why he could not fairly and impartially try case and whether he had any courtroom acquaintance with counsel, where juror during jury's deliberation stated that he had been informed that proponent's attorney was an attorney for the underworld and for gamblers. Code Civ. Proc. § 657, subds. 1, 2.

8. New trial 🔑27, 56

Jury's misconduct or irregularity which does not operate to the prejudice of a party furnishes no ground for a new trial. Code Civ.Proc. § 657, subds. 1, 2.

9. Appeal and error 🔑895(3)

Question whether juror's irregularity was prejudicial and warranted granting of new trial was not presented on appeal de novo. Code Civ.Proc. § 657, subds. 1, 2.

10. Appeal and error 🔑978(3)

So long as there appears any tangible theory leading to trial judge's conclusion that party was prevented from having a fair trial because of irregularity of juror, and was therefore entitled to a new trial, trial judge's action was conclusive and not open to review. Code Civ.Proc. § 657, subds. 1, 2.

11. New trial 🔑56

Trial court, in passing on question of whether party was entitled to a new trial because of irregularity of juror, was not required to speculate as to whether verdict would have been different but for the irregularity. Code Civ.Proc. § 657, subds. 1, 2.

Appeals from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceeding in the matter of the estate of Jennie Mesner, etc., deceased, wherein Charles W. Cradick filed a will for probate, and wherein Abraham Reich and others opposed the petition for probate on ground that deceased was of unsound mind and on ground of fraud and undue influence. From an order granting the proponent a new trial after judgment refusing probate of will on ground that it was induced by fraud and undue influence, the contestants appeal, and, from the judgment, the proponent cross-appeals.

Judgment and order affirmed.

Mitchell & Gold and Mark F. Jones, all of Los Angeles, for appellants.

Dailey S. Stafford and Jean Wunderlich, both of Los Angeles, for respondent and cross-appellant.

SHINN, Justice.

Jennie Mesner executed a will April 19, 1943, and a codicil dated October 6, 1943, under which appellants Esther, Rachel and Freda Reich, with numerous others, were beneficiaries. On November 30, 1943, she executed another will and on December 1, 1943, a codicil thereto, in neither of which were appellants remembered. Mrs. Mesner died December 18, 1943. The latter documents, which will be referred to as the November will, named Abraham Friedman, a half brother of Mrs. Mesner, and Charles W. Cradick, an attorney, as executors. Friedman declined to act and the will was offered for probate by Cradick. The Reichs opposed the petition for probate, alleging unsoundness of mind, and that the execution of the will was procured by means of the fraud and undue influence of Abraham Friedman. The issues were tried to a jury, which rendered a special verdict that the testatrix was of sound and disposing mind, but that the execution of the will had been induced by fraud and undue influence. Proponent Cradick made a motion for a new trial, upon the grounds, among others, of insufficiency of the evidence and misconduct of a juror. The motion was granted solely upon the ground of irregularity in the trial, consisting of the alleged misconduct. The contestants Reich have appealed from the order granting the new trial and the proponent has filed a cross appeal from the judgment upon the verdict refusing probate of the will, under Rule 3a of the Rules on Appeal.

[1] We shall consider first the cross appeal of the proponent, Cradick. Upon this appeal, it is urged that the evidence was insufficient to establish fraud or undue influence, and that the judgment should be reversed with directions that the will be admitted to probate. This point is presented as distinct from any questions involved on the appeal from the order granting the new trial. If it should be found to be well taken and that a reversal is in order, the questions involved on the appeal from the order granting the new trial would become moot. But the point is not well taken; there was sufficient evidence to justify a finding that the will was procured by the exercise of undue influence by Abraham Friedman.

Mrs. Mesner at the time of her death was 63 years of age. She had long been a sufferer from a nerve and skin ailment, manifested in an almost unbearable itching sensation which caused her to be extremely nervous, prevented sleep except under the influence of powerful drugs, impaired her nervous system and mental capacities, and gradually wore down her vitality. Early in 1943 she had been in an institution at Rochester for treatment. After her return to Los Angeles she was constantly under the care of physicians and each day was given heavy doses of opiates. She gradually became weaker and on December 18, 1943, she died of exhaustion and failure of heart action. The record is replete with evidence of her intense suffering, her distressed condition of mind, and the hopelessness of her condition. One physician who attended her testified that her condition caused a degeneration of the brain and nervous system.

In October, 1943, testatrix was in a hospital in Culver City. On or about October 17, a few days before she was returned to her home from the hospital, Abraham Friedman came from Cleveland and took up his abode in her home, and remained there until the time of her death. The Reichs were not relatives, but Mrs. Reich had been extremely attentive and helpful to Mrs. Mesner and was frequently spoken of by the latter as her closest and best friend. Mrs. Reich had sent word to Abraham Friedman, requesting him to come to Los Angeles. The evidence of fraud and undue influence related to the conduct of Friedman in his efforts to prevail upon Mrs. Mesner to execute a new will. The friendly relations between Mrs. Mesner and the Reich family were well established by the testimony of a number of witnesses. Mrs. Mesner was deeply attached to Mrs. Reich and there was no evidence of any rift between the two, nor of any cooling of Mrs. Mesner's affection. Friedman was strongly opposed to the provision which was made for the Reich family by the April will. One of the nurses testified he gave her orders not to allow Mrs. Reich to see Mrs. Mesner and that members of the Reich family were not to be left alone with her at any time; that when the Reichs would come and the nurse left the room, he would order her to return immediately. There was testimony of witnesses who were present in the house that Friedman constantly and persistently urged upon Mrs. Mesner that she change her will and leave all her estate to her relatives. He said to her, "You have to leave everything to your relatives. I want the ear rings to my wife and some of your jewels to be distributed to my daughters." Similar demands were frequently made upon her, both day and night. Mrs. Mesner, despite the use of heavy doses of opiates, seldom went to sleep before 4 or 5 o'clock in the morning and would remain under the influence of the drugs for a considerable time after she awakened. Physicians who called upon her in the morning were often unable to treat her because of her stupefied condition and had to return later in the day. At night when the nurses would leave Mrs. Mesner's room, Friedman would enter it and repeat his demands that she change her will. He bothered her in this fashion as late as 2 or 3 o'clock in the morning. At least a dozen times he sought the assistance of an attending physician, Dr. Rost, in arranging for the execution of a new will by Mrs. Mesner. The physician, according to his testimony, observed that Friedman's activities were having a harmful effect upon his patient and threatened to destroy her will to live. In order to avoid what he deemed a persecution of Mrs. Mesner and to end the mental torture which it occasioned, he finally called Mr. Cradick, the attorney, in order that a new will might be prepared. Before he had done this, he inquired of Fanny Sonin, one of the nurses, who slept in a room next to that of Mrs. Mesner, as to the cause of his patient's steady decline and, according to the testimony of Fanny Sonin, the following occurred:

"A. He says, 'I have got to know it,' I say, 'Well, if you would be here at night and the whole day, you would know the reason why she is going down,' and he says, 'What do you mean, she has got a nurse, she has got a night nurse, why can't they take care of her?', and I said, 'The nurses are taking care of her but Mr. Friedman annoys her day and night and keeps on talking one thing, "Change the will, change the will,"' and I say 'Naturally, if she was made out of iron, she couldn't stand it to have somebody tell, "You are going to die, change the will, change the will."'

"Q. What did Mr. Friedman say to that? A. He didn't say a word, he was seated and didn't say a word."

During all the time this was going on, Mrs. Mesner continued to insist to Friedman and to others that she was satisfied with her will and did not desire to make any changes in it. She also complained of the treatment of Friedman. She told Mrs. Reich over the telephone that she, Mrs. Reich, had brought an enemy into her house, and that he was waiting for her to die, that she could not stand it any more, and that she could not get him out of the house. At times she wept, saying that she had so much trouble she could not stand it any more and that she felt that she was going to die. She frequently wept when Friedman was talking to her and on many occasions the nurses called in physicians to quiet her with drugs. Many times Mrs. Mesner expressed a desire to friends that Friedman would leave, saying, "He bothers me more than my sickness," but she declared that she knew of no way to get rid of him. Friedman was heard to call the office of the attorney upon several occasions, and the two were in Mrs. Mesner's room with her for about three-quarters of an hour shortly before the execution of the will. The described activities of Friedman were continuous over a period of about one and a half months. Mrs. Mesner was not shown to have been free from the pressure which he was exerting at any time until after she had made the new will. She passed away less than three weeks after the will was executed.

The conditions under which Mrs. Mesner lived for some five or six weeks immediately prior to the execution of the will were described by numerous witnesses for the contestants. There was abundant testimony to prove that Friedman was making a determined effort to have his way and that Mrs. Mesner consistently opposed him. A more detailed statement of the evidence upon these points would but emphasize the strength of the case of the contestants. Their evidence presented a case of a woman who was tortured in her body by a most distressing and weakening illness and in her mind by the persistent pressure of a half brother to induce her to revoke a will with which she was entirely satisfied, and to make a new one which would omit all provision for her closest friend, and the friend's family, and provide more bountifully for some of her relatives.

The arguments of cross-appellant go to the weight, rather than the sufficiency of the evidence. One of them is that the terms of the new will were of small advantage to Abraham Friedman and that he would have had little incentive to induce Mrs. Mesner to change the earlier will. We observe that he took eight per cent of the estate under the April will, and twelve per cent under the November will. The share of Mike Friedman, a brother, was increased from three per cent to five per cent of the estate. Esther, Rachel, and Freda Reich each took two per cent by the earlier will and nothing under the later one. Eight others who were remembered in the April will with small percentages of the estate took nothing under the November will. There were three bequests of two per cent each, one of three per cent, and one of one per cent to legatees who were not remembered in the April will. The estate, it is said, was of the approximate value of $150,000. The November will contained thirty bequests, consisting of percentages of the estate, and they totalled ninety-five per cent. It did not increase any of the earlier bequests, other than those of Abraham Friedman and his brother Mike. The increases to them equalled the six per cent that was taken from the three members of the Reich family. The argument that Abraham Friedman had no incentive to bring about a change in the terms of the April will must fail in view of these facts. But it is quite immaterial, so far as this court is concerned, whether he had such incentive. The case of the contestants did not depend upon a presumption of the use of undue influence, nor upon evidence that Abraham Friedman profited by the new will. There was direct evidence of his use of undue influence.

[2] Cross-appellant's further arguments are to the effect that the jury was not justified in drawing the inference that the will was executed as the direct result of the insistence and importunities of Friedman. This is saying, in substance, that the only reasonable inference that could have been drawn from the conditions described by the witnesses for the contestants was that Mrs. Mesner voluntarily changed her mind, was better satisfied with the terms of the November will than she had been with those of the April will, and that she reached this conclusion uninfluenced by any effort on the part of Friedman to force his wishes upon her. We are satisfied that the evidence indicated the reverse to be true. There was nothing in the evidence of the contestants to suggest that Mrs. Mesner was dissatisfied with the earlier will. There was much to indicate that the presence of Friedman in her home and his efforts to accomplish his purpose weighed heavily upon her mind and caused her much distress. As her vitality failed, her ability to resist diminished. It was a reasonable conclusion that it was never her desire to omit provision in her will for the contestants; that she resisted doing so as long as she had power to resist, and gave in to the demands of Friedman only as the price of peace. If, as the jury found to be the case, Mrs. Mesner reluctantly abandoned her own wishes with respect to the disposition of her estate, and acquiesced in those of Friedman under the conditions portrayed by the evidence of the contestants, there was made out a complete case of the execution of a will brought about by the use of undue influence. The undue influence which will invalidate a will may be exercised in several ways. One of these

is by insistent importunity carried to such an extent that it destroys free agency, overcomes the will of the testator without convincing his judgment, and brings about the execution of a will which expresses the desires of the person exerting the influence, rather than those of the testator. In re Estate of Sprotson, 4 Cal.2d 717, 52 P.2d 924; In re Estate of Greuner, 31 Cal.App.2d 161, 87 P.2d 872; In re Estate of Hetterman, 48 Cal.App.2d 263, 119 P.2d 788.

[3] The briefs are properly limited to a discussion of the evidence of the contestants, without reference to any evidence of the proponent that might be in conflict therewith. The judgment in favor of the contestants could be reversed only in case it should be found that the supporting evidence upon the issues of undue influence and fraud was so deficient as to render a new trial unnecessary and to require a direction that the will be admitted to probate. There being no such deficiency of evidence upon the issue of undue influence, the judgment may not be reversed. It is unnecessary to discuss the issue of fraud.

The motion of the proponent for a new trial was made upon numerous grounds. It was not granted for insufficiency of the evidence but should be affirmed if it is sustainable upon any of the other grounds of the motion. We are of the opinion that it should be affirmed upon the ground of misconduct of a member of the jury, which constituted a prejudicial irregularity in the trial.

[4] Affidavits and counter affidavits were filed on the motion for new trial. Those of the proponent set forth facts which, it is contended, were sufficient to show that one of the jurors, Franklin H. Hamilton, was guilty of concealing facts upon his voir dire examination which, if disclosed, would have tended strongly to show that he was not in a state of mind which would enable him to act as a fair and impartial juror. He was asked upon voir dire whether he knew of any reason why he could not fairly and impartially try the case and he answered that he knew of no such reason and that he would be guided solely by the evidence and the instructions of the court. He and the other jurors were asked whether they had personal or any more than a court room acquaintance with any of the counsel in the case, naming, among others Charles W. Cradick, the attorney who drew the will and who was named as one of the executors, and offered it for probate. His answer was in the negative. June W. Harrison, one of the jurors, made affidavit as to statements of Hamilton in the jury room during the deliberations, as follows: " 'I don't want this to go outside the jury room, mind you, but I had this man Charles Cradick looked up at the Hall of Records—I have a personal friend there—Cradick was the attorney for the underworld and big gamblers, and was attorney for Albert Marco. You know a man like that can't be believed or trusted. And those girls who work for him can't be believed because they are doing just what he tells them to do.' " Caroline S. Phillips, an investigator, also made an affidavit, in which she stated that she had interviewed juror Hamilton after the trial and "that during said interview Mr. Hamilton stated to affiant that he had been foreman of said jury and that, while the jury was deliberating and talking the case over, one juror criticized counsel for contestants' denunciation of Charles W. Cradick, proponent of the will, whereupon Mr. Hamilton said he felt he should say something 'to offset' this juror's criticism, and it was then that he stated to the jury that he deemed it his duty to say he had been informed by a responsible friend of his that Mr. Cradick had represented underworld characters and slot machine operators, and that he had had some trouble as an official of Eagles Lodge 102. Questioned as to when he received such information concerning Mr. Cradick, Mr. Hamilton said he thought 'it must have been some months now,' and that he had heard about it several different times." Juror Hamilton, in an answering affidavit, made the following statement: "While the jury was discussing the case one of the jurors criticised attorney Jones for his bitter denunciation of attorney Cradick in the courtroom, affiant thereupon stated that since the subject had come up in regard to one of the attorneys affiant felt it his duty to state what he had heard about attorney Cradick. Affiant stated that he had been

informed by a responsible friend of his that Mr. Cradick himself had at times represented underworld characters and slot machine operators, etc., and that he had had some trouble as an official of the Eagles' Lodge No. 102. Affiant stated that he personally did not know anything about Mr. Cradick and that he believed everything that occurred in a jury room should be kept sacred and that the jurors' decisions would be according to the testimony presented and according to the instructions of the court and not according to any statements made by the attorneys. That affiant has no recollection of stating that he had had Mr. Cradick looked up at the Hall of Records and it is not a fact that he had had him looked up. He did not state in words or in substance that an attorney for Albert Marco could not be believed or trusted, but did state that he would not believe attorney Cradick, affiant having based said statement solely upon the testimony of attorney Cradick at the trial of the above entitled case." It was for the court, and not Mr. Hamilton, to decide whether he was qualified to act as a juror. There was a sufficient showing that he entertained a state of mind which rendered it doubtful whether he would or could be guided solely by the evidence produced at the trial.

[5] It is well settled that intentional concealment by a juror during his voir dire examination of a state of mind which would prevent his acting impartially is misconduct constituting an irregularity for which a new trial may be granted under section 657, subdivisions 1 and 2, of the Code of Civil Procedure. Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407; People v. Galloway, 202 Cal. 81, 259 P. 332; Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701; see also 20 Cal.Jur. 54; 39 Am.Jur. 65, sec. 45.

[6] Affidavits of jurors may be received as to occurrences during the trial and the deliberations of the jury which tend to prove the existence of prejudice in the mind of a juror, which would prevent his acting as an impartial juror, where the state of mind is charged to have been entertained and to have been intentionally concealed during his voir dire examination. Williams v. Bridges, supra; Gray v. Robinson, 33 Cal.App.2d 177, 183, 91 P.2d 194. This is a recognized exception to the general rule that affidavits of jurors may not be received to impeach the verdict except upon the ground that it was arrived at by resort to chance. People v. Gidney, 10 Cal.2d 138, 146, 73 P.2d 1186; Maffeo v. Holmes, 47 Cal.App.2d 292, 117 P.2d 948; 23 C.L.R. 359.

[7] Upon the evidence, consisting of the affidavits, the court was warranted in concluding that the sentiments expressed by Mr. Hamilton in the jury room were entertained by him at the time of his voir dire examination. His affidavit contained no denial of that fact, and his alleged statements to the investigator, Caroline S. Phillips, carried his information back to a time prior to the commencement of the trial. Appellants say that juror Hamilton was not asked whether he had ever heard anything derogatory concerning any of the parties or their counsel, or knew anything concerning their reputations, and that his answer that he knew of no reason why he could not act fairly and impartially was not shown to have been untrue. We are not in agreement with this contention. The question which the juror answered in the negative is one customarily asked by courts and lawyers in the interrogation of prospective jurors, and it is an invitation to them to disclose such facts as Mr. Hamilton had in his mind. He had been advised during the examination that Mr. Cradick had prepared the will, was named as one of the executors and was a party to the litigation. He apparently was of the opinion that the information which he claimed to possess was a sufficient reason for believing that Mr. Cradick was not a trustworthy or truthful person. If he had believed otherwise he would scarcely have made the argument in the jury room which was attributed to him, and which he tacitly admitted having made. The argument that he may have believed he could put the information out of his mind, or that he would not be influenced by it must fail in view of his later conduct, and especially in view of the court's implied finding that he was guilty of intentional concealment. The questioning of the jury

was sufficient to call for the disclosure of Mr. Hamilton's state of mind toward Mr. Cradick. We cannot agree with the following statement of the contestants in their opening brief, "But in any event, if the respondents desired to obtain a jury whose members had not heard anything derogatory to the parties to the action or to their counsel, then questions directed to this matter should have been asked of the jurors." Counsel for the proponent were not required to go to the absurd length of planting seeds of distrust in the minds of the jurors by propounding such questions.

[8-10] Misconduct or irregularity which does not operate to the prejudice of a party, of course, furnishes no ground for a new trial. The question whether the irregularity was prejudicial is not presented on appeal de novo. The trial judge decided that it was prejudicial from a consideration of all the intangible conditions created by the circumstances and occurrences which went to make up the atmosphere of the court room during the trial, which is something that cannot be adequately reflected in a printed record. It is not unreasonable to believe that the case of the proponent was prejudicially affected by the irregularity and, if it was so affected, he was prevented from having a fair trial. So long as there appears any tangible theory leading to this conclusion, the action of the trial judge is conclusive upon this court. It is not open to review. Tunmore v. McLeish, 45 Cal.App. 266, 187 P. 443; Abercrombie v. Thomsen, supra, 59 Cal.App.2d 331, 138 P.2d 701.

[11] The trial court was not required to speculate as to whether the verdict would have been different, but for the irregularity. Its action in ruling upon the motion was not controlled by what were considered to be the probabilities that the proponent would prevail upon a retrial. He was entitled to a fair trial before an impartial jury, according to the established forms of law, whether he had a good case or a poor one. The trial judge, although of the opinion that the verdict in favor of contestants was not against the weight of the evidence, was unwilling to allow it to stand, in view of the apparent advantage which they had enjoyed through the presence on the jury of one who was strongly inclined against the proponent of the will. He considered the maintenance of the purity of the trial procedure to be of more consequence than a correct decision of the particular case. We concur in this view. Other grounds urged for affirmance of the order granting a new trial do not require attention.

The judgment is affirmed, subject to the order granting proponent a new trial; the order granting the new trial is affirmed; respondent on each appeal to recover costs of appeal.

DESMOND, P. J., and WOOD, J., concur.

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77 Cal.App.2d 697

BURNS v. RADOICICH et al.

Civ. 7286.

District Court of Appeal, Third District,
California.

Jan. 17, 1947.

Hearing Denied March 17, 1947.

1. Evidence ⚷594

Generally, a trial court may not arbitrarily disregard the unimpeached testimony of a witness, but the rule has exceptions.

2. Evidence ⚷588, 590, 594

A trial court is not bound to accept testimony of a witness merely because it is not contradicted, but verity of such testimony is to be tested in light of all of the circumstances, and interest of the witness in the outcome of the litigation is of importance in weighing his testimony.

3. Fraudulent conveyances ⚷102

Relationship between grantor and grantee does not justify an inference of fraud in a conveyance, but it is a fact which gives greater weight to other circumstances, than might otherwise attach to them. Civ.Code, § 3439.04.

4. **Witnesses** ⚷315

The manner in which a witness testifies may operate as an impeachment of verity of his story.

5. **Evidence** ⚷588

Inherent improbability justifies rejection of a witness' testimony in its entirety.

6. **Appeal and error** ⚷1012(1)
Evidence ⚷588

Testimony which is evasive, equivocal, confused or otherwise uncertain may be disregarded, and reviewing court may not disturb the rejection of uncontradicted testimony if it is discredited under such tests.

7. **Fraudulent conveyances** ⚷299(1)

Proof indicative of fraud in a conveyance may come by inference from circumstances surrounding the transaction, relationship and interest of the parties. Civ.Code, § 3439.04.

8. **Fraudulent conveyances** ⚷14

Indicia of fraud when considered separately may be insufficient to establish fraud in a conveyance but, when considered together, by their number and association, may suffice as strong evidence of fraudulent intent. Civ.Code, § 3439.04.

9. **Fraudulent conveyances** ⚷299(11)

Evidence supported finding that conveyances by insolvent to his son and brother should be set aside at creditor's suit, as fraudulent. Civ.Code, § 3439.04.

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Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Mary M. Burns against John Radoicich, Mike Radoicich, individually and as guardian of the estate of Vernon Radoicich, and others, for a money judgment against defendant John Radoicich and an adjudication setting aside as fraudulent two conveyances of real property. From a judgment for plaintiff, the defendant Mike Radoicich, individually and as guardian of the estate of Vernon Radoicich, alone appeals.

Affirmed.

Gladstein, Andersen, Resner, Sawyer, & Edises, of San Francisco, for appellant.

Galen McKnight and Frank C. Lerrigo, both of Fresno, for respondent.

LEMMON, Justice Pro tem.

By the judgment in this case, plaintiff recovered a money award against John Radoicich and an adjudication setting aside as fraudulent two conveyances of real property, one made by John Radoicich and wife to Mike Radoicich and the other by the same grantors to Vernon Radoicich. Mike Radoicich individually and as guardian of Vernon Radoicich appeals from the judgment and attacks that part of the judgment which voids the two conveyances.

John and Vernon are father and son and John and Mike are brothers. John, his wife, Zora, and Mike located in Madera county in the year 1924, on a forty acre farm which they leased and worked together. Vernon was born in the year 1925 and was a minor until after the judgment was entered. Since the birth of Vernon, the four have lived continuously in the same house, except for several months in 1925 during which Mike was absent. In 1927 the two brothers bought forty acres of land and took title thereto as tenants in common. The following year improvements, including a house, were erected thereon, the cost of which was advanced by Mike. To protect Mike for his outlay and in October, 1928, John conveyed to him his undivided one-half interest in the twenty acres upon which the improvements had been erected. Thereupon, Mike became the sole owner of that twenty acres and the two brothers remained the owners as tenants in common of the remaining twenty acres originally purchased by them. This latter property is one of the parcels, the title to which is involved in this appeal, and will for convenience be referred to as parcel No. one. In 1929, John bought another twenty acres, immediately to the south of and adjoining the forty acres originally purchased. This purchase was upon contract, the vendor being Charles F. Crothers. In 1937, Crothers transferred his interest in the contract and land to Nellie B. Hunkins, the Crothers contract was thereafter cancelled, and a new contract was entered into between Nellie B. Hunkins and John for the sale of the land from her to him. The real property, the subject of this contract, is the other parcel the title to which is here involved. It will be referred to as parcel No. two.

It is conceded that at the times when the two questioned deeds were executed and delivered John was insolvent and that if the transfers were not made for a fair consideration they were subject to attack. (Sec. 3439.04, Civ.Code.) It is appellants' contention that as to each transfer there was a fair consideration.

On August 19, 1940, there was paid to Mrs. Hunkins through a title company by a check signed by Mike upon his bank account the sum of $1850.00. Thereupon a deed was executed by her to John, covering parcel No. two. On the same day, a deed was executed by John and Zora to Vernon conveying this property. Three days later, John and Zora deeded to Mike parcel No. one. Mike, John and Zora each testified that Mike paid to John the sum of $1000.00 in cash for this deed. The original indebtedness upon the north forty acres of which parcel No. one is a part was $5100.00. This indebtedness had been reduced on August 22, 1940 to $4800.00 and was evidenced by a promissory note executed by John, Zora and Mike. There is evidence in the case that parcel No. one was worth on that date $5500.00 and appellants argue there is a fair consideration for that transfer. As to parcel No. two it is appellants' contention that John, upon receiving title, became a trustee for Mike, and the conveyance from him to Vernon did not diminish John's assets.

That there was a close association between Mike and John during all of the period of time mentioned admits of no doubt. That association was one of extreme faith and confidence. John, his wife and son lived with Mike in the house built upon the twenty acres, the title to which became vested in Mike. And upon this same property John erected in 1938 a packing shed and engaged in the business of packing and processing of raisins thereon. The two parcels here in question were irrigated from Mike's property. Each of the brothers worked upon these two places, though John's efforts were mostly devoted to the packing business after the erection of the packing shed. Mike at times helped his brother in that business, There is slight evidence that some of these activities were conducted under the name of Radoicich Bros. John's plight in August when the deeds were made must have been known to this circle of intimates; indeed, the record affirmatively shows that it was known by all of them.

Appellants contend that the findings of fraudulent character of the transfers is contrary to the uncontradicted evidence in the record and they are therefore wholly unsupported.

[1-6] Although a trial court may not arbitrarily disregard the unimpeached testimony of a witness, this rule, as has been stated, has many qualifications and exceptions. The rule, frequently followed in this state, is expressed in Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733, 734, 851, 35 L.Ed. 501: "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced." See also Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; Blanc v. Connor, 167 Cal. 719, 722, 723, 141 P. 217. It is thus seen that a trial court is not bound to accept and blindly believe

the testimony of a witness merely because it is not contradicted, but, to the contrary, the verity of such testimony is to be tested in the light of all of the facts and circumstances. Simon Newman Co. v. Woods, 85 Cal.App. 360, 365, 259 P. 460; MacDiarmid v. McDevitt, 97 Cal.App. 414, 418, 275 P. 500. The interest of the witness in the outcome of the litigation is of importance in weighing his testimony. County of Sonoma v. Stofen, 125 Cal. 32, 38, 39, 57 P. 681. Relationship between grantor and grantee does not justify an inference of fraud in the conveyance, but it is a fact which gives greater weight to other circumstances, if any such appear, than might otherwise attach to them. Bank of Hendersonville v. Dozier, 24 Tenn.App. 178, 142 S.W.2d 191. The manner in which a witness testifies often operates as an impeachment of the verity of his story. Phillips v. Hobbs-Parsons Co., 67 Cal.App. 199, 227 P. 622. Inherent improbability justifies the rejection of a witness's testimony in its entirety. Blankman v. Vallejo, 15 Cal. 639. Testimony which is evasive, equivocal, confused, or otherwise uncertain, may be disregarded. 20 Am.Jur. 1031. Thus, a reviewing court may not disturb the rejection by the trial court of testimony which is uncontradicted if it is discredited under these tests.

In the light of these rules, we may not say that the trial court was bound to accept the version of these transactions related by the parties thereto and who are the defendants in this action. John did not know that a deed had been made to him of parcel No. two; neither did he know that he and his wife had executed a deed to Vernon. He said that he did not discuss the deed to Vernon with his wife or with the party at the title company office where the deeds were prepared prior to the execution thereof. Stranger still, he said he did not know that Vernon had a deed to the property until Vernon so informed him sometime after the recordation of the deeds. He denied that he had signed a financial statement at a bank listing the entire sixty acres as the property of Radoicich Brothers, and when confronted with the statement, he was evasive as to whether the signature appearing thereon was his. He denied having listed early in 1940 the sixty acres as belonging to him in an application for a bond. There is proof that he did sign such an application. He had a poor or no recollection about important matters, particularly where admissions might be damaging to the defendants. In a few instances, he repudiated answers which he had previously made with positiveness. When Mike was under cross-examination questions were directed to him as to the source of the $1000.00 which he stated he had paid to John. He was evasive, as he had been as to the number of bank accounts in his name, and finally stated that the money had been buried on his ranch. When pressed as to where on the ranch the money had been buried he refused to divulge this information and concluded by saying, "That is my secret." This inquiry was quite important. It related to something material in the case. When a witness evades or refuses to answer a question which is directed to elicit material testimony, the court is warranted in distrusting any or all of such witness's testimony. Zora contributed little as a witness. She was present when the $1000.00 was paid by Mike to John but did not know where Mike had procured the money. Vernon's deposition (he being away in the armed service at the time of the trial) was introduced. He stated that parcel No. two from his early childhood had always been referred to in the family circle as belonging to him; that he worked exclusively thereon and that $250.00 to $275.00 given to him as presents was used in making payments upon the contract under which his father was purchasing the property. He claimed that in August 1940, his father stated to him that he could make no further payments on that contract; that he appealed to his uncle and that Mike agreed to pay for him the balance due to Mrs. Hunkins. However, the contract and the equitable interest in the land was in John and if the balance of contract price was paid with John's money the conveyance to Vernon while John was insolvent would under the law be fraudulent as to John's creditors.

[7, 8] Evidence of fraud in this case is circumstantial. Indeed, direct proof of

fraudulent conveyance is often impossible. Proof indicative of fraud may come by inference from circumstances surrounding the transaction, relationship and interest of the parties. Fitz-Patrick v. Osborne, 57 Cal.App.2d 226, 134 P.2d 297. Indicia of fraud when considered separately may be insufficient to establish fraud but, when considered together, by their number and association may suffice as strong evidence of fraudulent intent. What has been here related as bearing upon the impeachment of John and Mike furnishes such circumstances. In addition, Mike worked and cared for parcel No. two after August 1940, sold the grapes harvested thereon and received the proceeds therefrom. On October 1940 he was appointed guardian for Vernon. Since his appointment as such he has never filed an accounting in the guardianship proceeding and not until March 24, 1943 did he open a bank account for Vernon in which to deposit the proceeds from that parcel or other funds belonging to the ward. In each of the years 1941, 1943 and 1944 he personally executed crop mortgages to secure indebtedness owing to banks and in each instance included crops growing or to be grown on parcel No. one.

[9] It is quite significant that on April 1, 1940 Mike executed to John a crop mortgage covering crops to be grown on parcels Nos. one and two. The indebtedness secured thereby did not mature until 1945. Nevertheless, four months later and shortly before the deeds here under attack were executed, when John was in financial difficulties and having much harassment in fulfilling a contract with the Federal Surplus Commodities Corporation under which he was obligated to deliver processed raisins, he paid to Mike upon this indebtedness, as he put it, "something like $4,000." The inference under all of the circumstances may not be said to be unwarranted that this was the source of the payment to Mrs. Hunkins and the $1000.00 which Zora stated she saw paid by Mike to John. It may be reasonably inferred that at the time the $4000.00 was paid there was an understanding between the brothers that so much thereof as was necessary would be used by Mike to pay Mrs. Hunkins, the title to be placed in Vernon's name in order to save the property for John, and that $1000.00 of the $4000.00 would be paid back by Mike to John to lend color of consideration. If that be so, that portion of the $4000.00 represented by the $1000.00 and the $1850.00 paid to Mrs. Hunkins was not paid upon the crop mortgage but represents money received by Mike to be paid out for John's use under that understanding.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 642

DENKE v. BOWES.

Civ. 13134.

District Court of Appeal, First District,
Division 2, California.

Jan. 16, 1947.

1. Appeal and error 🔑204(2)

When hearsay evidence is offered and received without objection, adverse party cannot complain thereof for first time on appeal.

2. Judgment 🔑159

An affidavit of defendant's counsel in support of motion to set aside default and default judgment was sufficient to support trial court's finding that default was taken through mistake, inadvertence and excusable neglect of defendant and his legal representative. Code Civ.Proc. § 473.

3. Judgment 🔑145(4)

The statute of limitations is meritorious defense, particularly when interposed in action commenced by administratrix with will annexed 12 years after due date of note sued on.

4. Judgment ⚷143(3)

The statute, authorizing court to relieve either party to action or his legal representative from default taken through his mistake, is remedial statute designed to make judicial proceedings equitable and fair and to relieve party from excusable neglect to take procedural steps at precise time designated. Code Civ.Proc. § 473.

5. Judgment ⚷135

The policy of law is to have every litigated case tried on its merits and court looks with disfavor on party attempting to take advantage of his adversary's mistake, surprise, inadvertence or neglect by procuring default judgment, regardless of merits of such party's case. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Action on a note by Ella Hermine Denke, as administratrix with the will annexed of the estate of Edmund Herman Denke, deceased, against E. W. N. Bowes. From an order granting defendant's motion to set aside a default and default judgment, plaintiff appeals.

Affirmed.

Hilary H. Crawford, of San Francisco, for appellant.

Norman Elkington, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff appeals on a settled statement from an order granting defendant's motion to set aside a default and default judgment.

On August 21, 1945, plaintiff as administratrix with the will annexed of the estate of E. H. Denke, deceased, commenced a suit against defendant upon a promissory note dated March 10, 1932, and payable on January 1, 1933, to E. H. Denke in the sum of $3,536.49. Summons was issued and served with a copy of the complaint on defendant in Alameda County on September 16, 1945. The default of the defendant was entered on October 17, 1945, and on October 18, 1945, a judgment by default was filed in favor of plaintiff in the sum of $2,986.49 principal plus $1,395.34, interest and $250 attorney's fees.

Subsequently on October 23, 1945, defendant filed a demurrer to plaintiff's complaint based on the statute of limitations. Thereafter on November 2, 1945, defendant filed a notice of motion to be relieved from default on the ground that the judgment had been prematurely entered through the mistake, inadvertence and excusable neglect of defendant's counsel. In support of the motion defendant filed an affidavit of merits made by defendant's counsel stating that defendant was out of the state and could not be communicated with, that because of the defendant's absence the affidavit was made by his counsel, that defendant "has made a full and complete statement of all of the facts in the above entitled cause to his counsel" and that he was advised by his counsel that he as a good and valid defense on the merits on the alleged cause of action set forth in the complaint. Further the motion was based upon "the demurrer to the complaint herein also served and filed herewith, and upon all other records and files in the above entitled cause."

In addition an affidavit of defendant's counsel was filed setting forth the following facts: On October 13, 1945, the defendant telephoned affiant and stated that he had been served with a summons and complaint in an action on a note, and told him all of the facts and his defenses. Affiant requested defendant to mail the papers to him and received them on October 15, 1945. At that time there was marked thereon the following: "Deliver to E. W. N. Bowes, 248 Monte Vista, Piedmont, California," and following that a pencil notation reading, "N.E. 10-11-45." Affiant assumed that the latter notation was defendant's notice to himself that the papers were served on October 11, 1945, and that therefore defendant had 30 days from that date to plead. Affiant prepared a demurrer; filed it on October 23, 1945, and served it on defendant's counsel on October 24, 1945. Two days later affiant telephoned plaintiff's attorney to suggest a postponement of the hearing on the demurrer. Plaintiff's counsel then told him that defendant was served on September 16, 1945, that his default for failure to appear was entered on October 18, 1945, and that a judgment was subsequently entered on the default.

Defendant's motion was heard on November 8, 1945, at which time no oral evidence was offered, the evidence being confined to all the papers on file. The court thereupon granted the motion and found that the default and default judgment were entered through the mistake, inadvertence and excusable neglect of the defendant and his legal representative.

[1] Appellant contends that the affidavit of merits is insufficient because it was made by respondent's counsel; hence the statement that respondent had made a full statement of the case was hearsay. He cites cases from Bailey v. Taaffe, 29 Cal. 422 to Pingree v. Reynolds, 23 Cal.App.2d 649, 73 P.2d 1266. They are not in point. Where counsel makes an affidavit stating what his client told him the affidavit is hearsay and subject to objection. But there is no rule of law more clearly settled than that when hearsay evidence is offered and received without objection, it is too late for the adverse party to complain for the first time on appeal.

[2] But section 473, Code of Civil Procedure, authorizes the court to relieve either a party "Or his legal representative" from a default taken through "his" mistake. Here the affidavit discloses mistake or excusable neglect of both the respondent and his legal representative. Here the evidence was sufficient to support the finding of the trial court that the default was taken "through the mistake, inadvertence and excusable neglect of said defendant and his legal representative."

Any deficiency in the affidavit was supplied by the record upon which the motion for relief was based. This disclosed a complaint filed August 21, 1945, on a promissory note executed March 10, 1932, payable January 1, 1933, and a demurrer setting up the statute of limitations.

[3] We are not in harmony with the argument that the statute of limitations is not a meritorious defense, particularly when it is interposed in a stale action of this kind commenced twelve years after the alleged obligation upon which it is based. In Fontana Land Co. v. Laughlin, 199 Cal. 625, 636, 250 P. 669, 674, 48 A.L.R. 1308, the court said: "The power to nullify acts of the Legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law. Nichols v. Randall, 136 Cal. 426, 69 P. 26; Shain v. Sresovich, 104 Cal. 402, 38 P. 51. They are to be viewed as statutes of repose, and as such constitute meritorious defenses. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279."

[4, 5] The same line of thought has been incorporated into the interpretation of section 473. It is a remedial statute designed to make judicial proceedings equitable and fair and to relieve a party from excusable neglect to take the procedural steps at the precise time designated. The rule of the cases is fairly stated in 14 Cal.Jur. p. 1075; "The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice."

Order affirmed.

GOODELL and DOOLING, JJ., concur.

77 Cal.App.2d 478

HAUSFELDER v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 15405.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1946.

Rehearing Denied Jan. 22, 1947.

1. **Joint tenancy** ⚿3

In action against estate for contents of safe deposit box which decedent and plaintiff leased as "joint tenants" under lease providing that all property "heretofore or hereafter placed in said box" was property of lessees as joint tenants, evidence sustained finding that decedent joined in lease of box for purpose of investing plaintiff with title to securities as decedent might cause to be deposited in box and that placing of decedent's stocks and bonds therein was at his request.

2. **Appeal and error** ⚿996

Where two inferences can reasonably be drawn from the evidence, appellate court cannot substitute its finding for that of trier of facts.

3. **Trusts** ⚿34(1)

Plaintiff who with decedent rented safe deposit box as "joint tenants" with right of survivorship did not hold securities in box as trustee on ground of confidential relationship with decedent so as to preclude plaintiff from obtaining title to contents of deposit box, where plaintiff had lived with decedent as his wife for five years prior to joint lease of box and during five years subsequent to their separation, plaintiff was decedent's employee and friend, since in absence of showing of exercise of undue influence, mere friendship does not constitute a confidential relationship.

4. **Fraud** ⚿50

To sustain presumption of constructive fraud more is required than mere confidence in another's integrity.

5. **Gifts** ⚿47(3)

In action against estate for contents of safe deposit box which decedent and plaintiff leased as "joint tenants" with right of survivorship, plaintiff met alleged burden of showing that she exercised good faith in dealings with decedent at time he signed rental agreement as well as when he directed plaintiff to place decedent's securities in box, where facts disclosed no fraud and that decedent was free from domination of plaintiff.

6. **Appeal and error** ⚿169

An issue which was not pleaded and which was not advanced as a theory at trial could not be considered on appeal.

7. **Trusts** ⚿1

For a "trust" to exist there must be a specific purpose, a designated beneficiary and duties of trustee specified by trustor.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

8. **Joint tenancy** ⚿3

A joint tenancy card signed by parties with reference to safe deposit box is, in absence of fraud or mistake sufficient to create a joint tenancy securing to survivor ownership of entire estate in contents of box.

9. **Gifts** ⚿29

The Uniform Stock Transfer Act does not forbid gifts of corporate shares by registered owner, and rights of parties to such gift as between themselves are the same as gift of any other movable property. Civ.Code, § 330 et seq.

10. **Gifts** ⚿4

When gift is effected by instrument in writing, gift is complete upon delivery of the writing.

11. **Gifts** ⚿18(1)

The only party who may question a gift not delivered is a creditor in whose behalf there is a presumption of fraudulent transfer. Civ.Code, § 3440.

12. **United States** ⚿91

Plaintiff who, with decedent, rented safety deposit box as "joint tenants" with right of survivorship was not precluded from obtaining title to government savings bonds deposited by decedent and payable to decedent on ground of treasury regulations prohibiting transfer, etc., where plaintiff's ownership was established by judicial proceeding and plaintiff's sole ownership was not acquired by "voluntary transfer inter vivos" prohibited by the regulation but only by virtue of decedent's death. 31 U.S.C.A. § 757.

13. United States ⚷91

Upon death of owner of United States savings bond payable to owner, title vests in such heir, devisee or surviving joint tenant as may be determined by appropriate court. 31 U.S.C.A. § 757.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Kathleen Hausfelder, sometimes known as Kay Hausfelder against Security-First National Bank of Los Angeles, executor of the estate of Joe A. Hausfelder, deceased, and others for possession and title to contents of a safe deposit box. From a judgment for plaintiff, defendants appeal.

Affirmed.

William R. Gallagher, of Los Angeles, for respondent.

Meserve, Mumper & Hughes, Walker, Adams & Duque, and Henry Duque, all of Los Angeles, for appellants.

MOORE, Presiding Justice.

Plaintiff sued the executor and the wife and children of decedent Joe A. Hausfelder for possession of and title to the contents of safe deposit box 423 in the office of the Hollywood Escrow and Safe Deposit Company. After a dismissal on May 21, 1945, of the action as to the legal heirs and wife, the latter filed her complaint in intervention in which she asserted that the property in box 423 was a part of the community estate of herself and decedent; that she is entitled to one half thereof as the community's survivor; and that the court should determine the actual controversy between her and plaintiff. In the same pleading the children as beneficiaries under the last will and testament assert their right to the estate of their father including all the property claimed by plaintiff, and to all issues and profits thereof. After a trial lasting about three days and the examination of 13 witnesses the court below made and entered judgment in favor of plaintiff from which comes this appeal.

Decedent executed his last will and testament on June 12, 1944, whereby he bequeathed his estate in the main to his children. He departed this life November 2, 1944, and his will was admitted to probate on January 3, 1945, when the defendant bank qualified as executor. But prior to the publication of his will decedent had at his own suggestion on April 9, 1943, joined plaintiff in the execution of a lease of the safe deposit box. Such lease contained the words "as joint tenants" stamped thereon and contained the provision that "all property of every kind at any time heretofore or hereafter placed in said box is the property of said lessees as joint tenants and upon the death of any of them passes to the survivors or survivor."

The first assignment is that there is no evidential support for the finding that decedent consented to the deposit of his securities in box 423. While it is true that respondent had continuously used the same box for her private purposes subsequent to April, 1941, and that it contained some of her own papers as well as stocks and bonds of decedent, which she had kept as a courtesy to him, at the time they joined in the rental agreement, yet the record discloses definite items of evidence which with the reasonable inferences therefrom would warrant the finding that decedent not only had knowledge that he had signed a joint tenancy agreement with an appreciation of its significance but also that he directed respondent to place certain securities in the box on February 9, 1944. The bank clerk who attended to the safe deposit box rentals testified that it was the custom to stamp the words "as joint tenants" on the lease forms only when such a contract was requested by the parties; that if decedent and respondent had not asked for the joint tenancy agreement the clerk would have suggested a different form.

[1] As to the only deposit made after the lease, respondent had custody of those securities prior to her locking them in the

deposit box. The witness Joplin testified that he saw decedent deliver to respondent a number of securities on a day early in 1944 which she placed in a brief case and "she was supposed to return them to the bank." In view of decedent's business acumen, his keen intelligence, his self-opinionated nature and his experience in renting safe deposit boxes the court was warranted in deducing decedent's serious intention of making the rental contract in joint tenancy and his definite purpose of placing his securities in the box.

The background of the box rental will further justify the inferences drawn by the court. Decedent had married Ruth in December, 1918. Three children, issue of that marriage, are the other intervenors. The couple were separated in 1923. While their property settlement agreement was not in evidence, proof was adduced to satisfy the court that the abandoned wife had disclaimed all interest in the property thereafter to be gained by her spouse. The lawyer who had negotiated on behalf of decedent testified that an agreement was executed by the parties early in 1924; that pursuant thereto decedent conveyed to Ruth by grant deed as her sole and separate estate a house in the city of Brawley, which with other properties she accepted in full settlement of all her rights in their community estate and of her claims for maintenance and support, while she, in consideration for such assets as she received, waived any and all claims or interest in or to any property that her husband might thereafter acquire. The lawyer recalled distinctly the provisions of the agreement which awarded custody of the three children to the mother and required their support by the father and which "constituted a full and complete property settlement agreement between them; that any property acquired by the parties was to be the separate property of the party so acquiring it." Such testimony was corroborated by the facts (1) that the deed was duly recorded and (2) that the wife never demanded of or received from her husband any support although she knew of his location and two of her daughters worked for him. Ruth denied that she had ever made a settlement with her husband, but such facts and the implications thereof indicate an absence of desire on the part of decedent to leave any part of his estate to Ruth Miller Hausfelder.

While decedent was never divorced from Ruth he later celebrated two marriages, first to Nellie who did not long survive, later to respondent Kathleen, May 17, 1930. After the latter event respondent continued to work for and with decedent in the operation of a distilled water company. Although they were divorced in 1938 and thereafter lived separate and apart, yet she remained in her same position till February, 1943, when he made her a present of the distilled water business and delivered to her a bill of sale thereof. Hardly two months elapsed after that gift until he joined with her in executing the joint tenancy lease of the safe deposit box.

[2] From the events recited it must appear to the most skeptical that the trial court had substantial evidence to support the finding that decedent joined in the lease of box 423 for the purpose of investing respondent with title to such securities as he might cause to be deposited in the box, and that the placing of his stocks and bonds therein was at his request. At most, where two inferences can reasonably be drawn from the evidence the appellate court is powerless to substitute its finding for that of the trier of facts. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660.

[3-6] Appellants invoke the propositions (1) that a confidential relationship existed between respondent and decedent and that this cast the burden upon her to show clearly that she exercised the utmost good faith in her dealings with him at the time he signed the rental agreement as well as on the occasion when he directed respondent to place his securities in the box; (2) that by reason of such confidential relationship respondent held the securities as a trustee. With respect to the latter no evidence is suggested, and we find none to indicate such relation. Respondent had lived with him as his wife five years prior to the joint lease of the lock box. During the five years subsequent to their separation

she was his employee and friend. In the absence of a showing of the exercise of undue influence mere friendship does not constitute a confidential relationship. Franz v. Porter, 132 Cal. 49, 54, 64 P. 92; Jackson v. Gorham, 98 Cal.App. 112, 116, 276 P. 391. To sustain the presumption of constructive fraud more is required than mere confidence in another's integrity. Meyer v. Zuber, 92 Cal.App. 767, 772, 268 P. 970. But conceding arguendo that it was respondent's duty to sustain the burden, the facts heretofore recited disclose that decedent was utterly free from the domination of respondent. No fraudulent act on her part appears in the evidence. Finally, a confidential relationship was not pleaded, nor was it advanced as a theory of the intervenors at the trial. This fact alone should dispose of that issue. Blanc v. Connor, 167 Cal. 719, 141 P. 217; Ernst v. Searle, 218 Cal. 233, 22 P.2d 715; Mathews v. Pacific Mutual Life, 47 Cal.App.2d 424, 118 P.2d 10; Donze v. Donze, 88 Cal. App. 769, 774, 264 P. 294. The authorities cited by appellants (McPhetridge v. Smith, 101 Cal.App. 122, 281 P. 419; Darrow v. Robert A. Klein & Co., 111 Cal.App. 310, 295 P. 566; Young v. Young Holding Corporation, Ltd., 27 Cal.App.2d 129, 80 P. 2d 723; Schwarting v. Artel, 40 Cal.App. 2d 433, 105 P.2d 380; Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220) are readily distinguishable. The indifference, neglect or positive action taken by an agent, attorney, or trustee, or the dealing by any one of them with a person who resposes all his confidence and thereby gains an advantage, is not to be confused with the behavior of a friend who serves another at his request and in a respect indicated. In the Lankershim case [9 Cal.2d 409, 71 P.2d 226] Miss Herbert exercised her forceful mind upon Lankershim who had entered "a state of progressive mental and physical disintegration," and made false representations to him. In the Young case the defendants were convicted of actual fraud. In the Schwarting case the defendant as agent took advantage of his principal who resided in Missouri and made a secret profit. The Darrow and McPhetridge judgments were against faithless confidential agents.

The arguments that if decedent had intended to make a gift of his securities to respondent he would have put her name on them, that he would have told her in clear and unmistakable terms that they were to be hers at his death, and that he would not have made a will bequeathing his property to his children after signing the rental contract for the safe deposit box, were properly to be presented to the trial court. Even if they were not argued there the experienced and learned judge had the advantage of having heard all the evidence and was qualified to draw reasonable inferences. Such deductions constitute the findings which cannot be upset when supported.

[7] The implication which appellants assert, that respondent held the contents of the box as a trustee, is not based upon legal logic but upon the theory that the effect of the joint tenancy agreement was destroyed by the asserted confidential relationship. A trust cannot come into being out of thin air. For a trust to exist there must be a specific purpose, a designated beneficiary and duties of the trustee specified by the trustor. Estate of Gaines, 15 Cal. 2d 255, 265, 100 P.2d 1055. There is no evidence herein from which any of these elements may be inferred. The only writing to which both respondent and decedent were signatories was the box rental lease. It contains nothing that would constitute the basis of a trust but on the contrary verily defeats the suggestion.

[8] That a joint tenancy was created by the contract for the lease of the safe deposit box is readily demonstrable. It is the law that a joint tenancy card signed by the parties with reference to a safe deposit box is in the absence of fraud or mistake sufficient to create a joint tenancy securing to the survivor ownership of an entire estate in the contents of the box. Estate of Gaines, supra, 15 Cal.2d at page 260, 100 P.2d 1055; Wallace v. Riley, 23 Cal.App. 2d 654, 74 P.2d 807; Estate of Fritz, 130 Cal.App. 725, 729, 20 P.2d 361; Young v. Young, 126 Cal.App. 306, 313, 14 P.2d 580.

[9] Appellants' attempt to establish the nullity of the contract because of the asserted intoxication of decedent at the time of his execution thereof was rejected by

the court's finding that he "executed this joint tenancy agreement voluntarily and of his own free will and with full and complete understanding of its meaning, purport and effect, and that he did not sign the same while so influenced by intoxicating liquors that he was unaware of his act and its full consequence and effect." The wife having waived all rights to such property as her husband might acquire, there remained no restriction upon the latter to alienate his property by gift or by contract. In their attempt to prevail against the court's finding appellants assume that the funds with which decedent acquired the securities in the safe deposit box were community property of himself and Ruth and cite authorities (Tomaier v. Tomaier, 23 Cal.2d 754, 758, 146 P.2d 905; Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003) to show that a joint tenancy could not exist in property in which the interest and title therein is not equal and co-extensive between the alleged joint tenants. The cited authorities are in point only with respect to an imaginary situation and do not apply to the facts found. Having no legal inhibitions against his transfers of property the decedent was free to give respondent either an entire estate or an estate in joint tenancy with himself. The Uniform Stock Transfer Act (Civil Code, secs. 330 et seq.) does not forbid gifts of corporate shares by the registered owner. The rights of the parties to such a gift as between themselves is the same as the gift of any other movable property. Crane v. Reardon, 217 Cal. 531, 532, 20 P.2d 49; Wilson v. Crocker First National Bank, 12 Cal.App.2d 627, 630, 55 P.2d 1028; In re Antkowskis' Estate, 286 Ill.App. 184, 3 N.E.2d 132; In re Connells' Estate, 282 Pa. 555, 128 A. 503, 38 A.L.R. 1362. The Civil Code sections were designed for the protection of corporations. But where the right and title of a donee of corporate securities has been established by judicial decree the statute is not applicable.

[10, 11] The further argument that surrender of all dominion over the contents of box 423 was indispensable to a completed gift is met by the fact that the gift to respondent was not a verbal gift but was effected by an instrument in writing. In such event the gift is complete upon delivery of the writing. Francoeur v. Beatty, 170 Cal. 740, 745, 151 P. 123; Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471. The only party who may question a gift not delivered is a creditor in whose behalf there is a presumption of a fraudulent transfer. Civil Code, sec. 3440. In the cases cited by appellants (Mutual Benefit Life Insurance Co. v. Clark, 81 Cal.App. 546, 254 P. 306; Lord v. Katz, 54 Cal.App.2d 363, 128 P.2d 907) there was neither a writing to evidence the transfer to the alleged donees nor delivery of the documents claimed.

[12, 13] Some of the contents of the safe deposit box are United States Government Savings Bonds, Series D. The regulations (31 U.S.C.A. § 757) governing the transfer of such bonds require (1) that the names and complete post office address of the owners and designated beneficiaries to such bonds be inscribed thereon at the time of issue; (2) that such bond be not transferrable. (Treasury Department Circular 596, secs. 3 and 4.) Circular number 530 provides that "the form of registration used should express the actual ownership of and interest in the bond and * * * the Treasury Department reserves the right to treat as conclusive the ownership of and interest in the bond expressed in the registration." Such "bond is not transferable and is payable only to the owner named thereon except in the case of disability or death of the owner * * * The regulation provides for the payment or re-issue of the bond upon the death of the owner to the "person found entitled thereto through judicial proceedings * * *"; provided however, that no such proceedings will be recognized "if they would give effect to an attempted voluntary transfer inter vivos of the bond" or would defeat or impair the rights of survivorship conferred by the regulations upon co-owners and beneficiaries. Marshall v. Felker, Fla., 23 So.2d 555, 161 A.L.R. 167. See secs. 315.17; 315.51 of Regulations. While appellants contend that the judgment varies the contract between decedent and the government and renders the regulations ineffective, yet it is quite clear (1) that the rules have not been violated in any respect, (2) that respond-

ent's ownership has been established by the instant proceeding and (3) that her sole ownership was not acquired by a "voluntary transfer inter vivos" but only by virtue of the decease of Mr. Hausfelder. There was not even an attempt to effect a completed transfer during decedent's lifetime. The claim of no co-owner or beneficiary is here involved. The only parties concerned are the donor and the donee and there is no provision of the regulations forbidding the gift of a bond by the owner. Marshall v. Felker, supra; Blair v. Kirchner, 319 Ill. App. 348, 49 N.E.2d 292. The provisions restrictive of the transfer of a bond by the registered owner are no longer applicable when such owner has deceased. They could have applied only in a contest between the government and the owner. Upon the death of the owner title vests in such heir, devisee, or surviving joint tenant as may be determined by the appropriate court. Davies v. Doran, 74 Cal.App.2d 304, 168 P.2d 452 is distinguished by the fact that a beneficiary was designated in the bonds and no decree authorized the transfer to another.

Judgment affirmed.

WILSON, J., concurs.

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77 Cal.App.2d 693

BROWN et al. v. ALDRICH et al.

Civ. 7254.

District Court of Appeal, Third District, California.

Jan. 17, 1947.

1. Automobiles 🔑244(26)

Evidence that truck was owned by employer and being driven by his employee when it collided with automobile was sufficient, together with evidence of other factors, to warrant finding that truck was being driven with employer's permission at such time, so as to render him liable for resulting injuries to occupants of automobile. Vehicle Code, § 402.

2. Automobiles 🔑244(26)

Evidence that employees driving employer's truck in alleged disobedience of employer's order when truck collided with automobile were not subsequently discharged constituted evidence of employer's permission originally given such employees and that employer did not consider that employees had feloniously taken the truck. Vehicle Code, § 402.

3. Automobiles 🔑193(8)

That particular use which permittee was making of truck at time of accident was one not within scope of his employment would not affect applicability of statute making owner liable for injuries caused by automobile used with his permission. Vehicle Code, § 402.

4. Appeal and error 🔑996

Where evidence does not show that trial court acted arbitrarily in drawing certain inference, and contrary evidence is not clear, positive, uncontradicted, and such that it cannot rationally be disbelieved, appellate court must affirm judgment rendered thereon.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Richard Brown, a minor, by Jack Brown, his guardian ad litem, and Jack Brown, against C. H. Aldrich, and others to recover for injuries sustained when an automobile collided with named defendant's truck. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Gilbert Moody, of Turlock, for appellants.

F. M. Brack, of Modesto, for respondents.

PEEK, Justice.

This controversy involves a question of the liability of an owner of a motor vehicle for the negligent operation thereof by another under the permissive use provisions of section 402 of the Vehicle Code. Although technically both the owner of the vehicle, C. H. Aldrich, and the driver thereof, Guadalupe Gonzales, the defendants against whom a recovery was had, are appellants herein, the parties in their briefs appear to treat Aldrich as the sole appellant and Gonzales as a defendant having a separable and adverse interest.

The record discloses that appellant Aldrich is the owner of three fruit ranches in Stanislaus county. He employs thereon, in addition to other help, Mexican Nationals, who are housed and fed by him and his partner in a camp situated on one of the ranches. On January 24, 1945, at 5 o'clock p. m., three of the Mexicans, including defendant Gonzales and another employee, H. P. Leon, took a stripped-down Chevrolet ranch truck which was kept at the camp for use on and between the ranches, and drove to the town of Hughson, a distance of three miles, where they consumed some beer. On their return to the camp the truck collided with plaintiff's car causing the damages for the recovery of which this suit was brought. At the time of the accident appellant Aldrich's truck was being operated by defendant Gonzales, with the express consent of Leon. Neither of the two men was a licensed driver, and the truck itself was unlicensed.

Here it should be noted, while there is evidence that defendant Gonzales, the driver of the car, was himself authorized by appellant Aldrich to drive the trucks on the ranches and sometimes drove by the way of the back roads between ranches, the theory on which Aldrich was held answerable appears to be that at the time of the accident the vehicle was being used by Leon as the permittee of Aldrich, and that it is immaterial as far as the latter's liability is concerned that Leon was not personally driving the car but had placed it in the hands of another. If the facts warranted, such a theory would accord with the principles of law applicable to the situation thus presented. Herbert v. Cassinelli, 73 Cal.App.2d 277, 166 P.2d 377.

[1] In addition to the employer-employee relationship the evidence discloses the existence of other factors which justified the trial court in drawing the inference of permissive use: the circumstance that the car was allowed to remain unlocked at the camp; that no check was made upon the gas, or oil, or mileage to determine whether or not it was used off the ranch; that said car frequently had been used on the highways on inter-ranch and other business while it was unlicensed, and on at least one occasion had been accompanied by Aldrich himself; and that neither Gonzales nor Leon was discharged from employment after the alleged disobedience of orders, but was retained in Aldrich's employ as before.

Thus viewed the present case appears to be indistinguishable in principle from Flemmer v. Monckton, 73 Cal.App.2d 271, 166 P.2d 380, recently decided by this court. In that case one LaLonde, who was an employee of Monckton, and lived on the latter's ranch, took one of the ranch trucks to drive to town on an errand of his own, and while driving back to the ranch caused the accident complained of. The trial court found that LaLonde was operating the vehicle with the implied permission of the owner under section 402 of the Vehicle Code, and gave judgment for the plaintiffs. This court, applying the principles announced in Burgess v. Cahill, 26 Cal.2d 320, 158 P.2d 393, 159 A.L.R. 1304, Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788, and Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868, held that the existence of the relationship of employer and employee, together with the same factors found in the present case and enumerated in the preceding paragraph, supported the inference of permissive use which the trial court drew, and affirmed the judgment predicated thereon.

Appellants contend, however, that, "because there was no consent either for the time, purpose or place, the truck was stolen from Aldrich by Gonzales, and no rule of law does or should make Aldrich responsible for Gonzales' negligence", and that "the judgment must be reversed, if for no other reasons, solely because of the fact that Gonzales and Leon actually stole the car from the possession of Aldrich at 5:00 P.M. on January 24."

The record does not sustain such contention. Evidence is disclosed therein showing that on various occasions, and after hours, Leon, sometimes in the company of other Mexicans and sometimes with both Mexicans and Caucasians, would drive over public highways to plaintiffs' ranch and purchase melons. Although Aldrich testified he did not know about such trips, nevertheless his expressed concern at the time of the accident was not based on the use of the truck at that particular time but rather on the fact that it was driven on a comparatively much-traveled public road. Support is thereby lent to the inference which the trial court might well have drawn that Aldrich's asserted lack of knowledge of the after hours use of the truck by the Mexicans was due solely to his unconcern about such use.

[2] In any event appellant Aldrich's conduct in retaining both men in his employ after the happening of the accident was wholly inconsistent with any concept that he considered them guilty of feloniously taking his property for their own use. Flemmer v. Monckton, supra, 73 Cal.App.2d at pages 271, 274, 166 P.2d 380.

Appellant Aldrich testified that while his truck was used principally around the dry yard near the camp in the summer, yet with his knowledge and consent it also was used to haul fruit out of the orchard to the dry yard, and during the winter was regularly used to transport laborers to and from the orchard—these trips necessitating traveling over public roads for at least a quarter of a mile. Likewise he testified that the truck on at least one occasion had been driven to the third ranch, a distance of three or four miles from the home ranch.

It therefore appears that the trial court was warranted in inferring that Aldrich had entrusted the truck to Leon for use which contemplated inter-ranch driving on public roads and the occasional use on such roads for purposes other than merely making a trip between ranches.

[3] Of course the fact that the particular use which the permittee was making of the vehicle at the time of the accident was one not within the scope of his employment would not affect the applicability of the provisions of section 402. Burgess v. Cahill, supra, 26 Cal.2d at page 323, 158 P.2d 393, 159 A.L.R. 1304; Bayless v. Mull, 50 Cal.App.2d 66, 75, 122 P.2d 608. See also, Souza v. Corti, 22 Cal.2d 454, 457, 139 P.2d 645, 147 A.L.R. 861. Were the rule otherwise, and limited to a respondeat superior liability, the statute would be of little benefit to innocent third persons injured by reason of the fact that the owner of the vehicle placed a dangerous instrumentality in the hands of another. Bayless v. Mull, supra, 50 Cal.App.2d at page 75, 122 P.2d 608.

The case of Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93, which appellants cite as being the one most nearly in point of all the cases discussed in the briefs, is actually of little assistance here due to the fact that it does not involve the factor of employer-employee relationship between the owner and the permittee, as does the case at bar.

[4] We stated in the Flemmer case, supra, 73 Cal.App.2d at page 276, 166 P.2d at page 383: "Since the evidence herein is such that it could not properly be said that the trial court acted 'arbitrarily' or was 'running away with the case' in drawing the inference of permissive use (Hicks v. Reis, supra, 21 Cal.2d at pages 659, 660, 134 P.2d 788), and since the evidence to the contrary is not 'clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved' (Blank v. Coffin, supra, 20 Cal.2d at page 461, 126 P.2d [868] at page 870), we have no alternative but to affirm the judgment thereon rendered. DeYoung v. DeYoung, 27 Cal.2d 521, 526, 165 P.2d 457; Estate of Bristol, 23 Cal.2d 221, 222-224, 143 P.2d 689."

Therefore our conclusion herein likewise must be that there was no error in the determination of the trial court in the present proceeding.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 621

PEOPLE v. CHAVEZ.

Cr. 579.

District Court of Appeal, Fourth District, California.

Jan. 10, 1947.

Hearing Denied Feb. 6, 1947.

1. **Homicide** ⚷228(5)

In prosecution for murder of accused's newborn baby, evidence including testimony of autopsy physician that baby was born alive and that it breathed and had heart action supported jury's implied findings that child was born alive and became a human being within meaning of homicide statute. Penal Code, § 192; Code Civ.Proc., § 1963, subd. 28.

2. **Homicide** ⚷228(5)

In prosecution for murder of accused's newborn baby, wherein autopsy physician testified that cause of death was hemorrhage, suffocation or both, that physician was unable or unwilling to attribute death to one of such causes alone did not make such evidence mere speculation or conjecture and did not affect question as to whether death resulted from a criminal act. Penal Code, § 192.

3. **Homicide** ⚷75

The failure to use due care in treatment of another where duty to furnish such care exists is sufficient to constitute that form of manslaughter which results from an act of omission. Penal Code, § 192.

4. **Homicide** ⚷228(5)

Evidence was sufficient to show that death of accused's newborn baby was caused by accused's criminal act, justifying conviction of manslaughter. Penal Code, § 192.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Josephine Chavez was convicted of manslaughter, and she appeals.

Affirmed.

Stutsman, Hackett & Nagel, of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., of San Francisco, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of her newborn baby. A jury found her guilty of manslaughter and she has appealed from the judgment.

The defendant was an unmarried woman about 21 years of age. She had previously had an illegitimate child, and at about 12:30 A. M. on March 31, 1945, she gave birth to the child here in question. She lived with her mother and sisters in a small house having two bedrooms, with a bath room off the kitchen porch. On this night the mother slept in the back bedroom, and the defendant occupied the front bedroom with her two sisters. She had attempted to conceal the fact of her pregnancy from her family by wearing a girdle and loose sweaters.

The circumstances surrounding the birth of this baby are disclosed by the testimony of the defendant alone, as there were no other eyewitnesses. After going to bed on the evening of March 30, she had several attacks of what she called "cramps". Apparently, she mistook her labor pains for cramps. Twice she arose and went through the kitchen and back porch to the bath room, and then returned to her bed. She made a third trip about 12:30 A. M., the other members of her family being asleep. She left the doors open and no lights were turned on. As she was sitting on the toilet she "felt a little pressure on the lower bones. Then I knew the baby was going to be born." She had not expected it to be born until the latter part of April. She did not call for help and, so far as she knew, no one was awake. She testified that "It came out rather slow. Next, the head was out, and it sort of dropped out real fast." She knew from her previous experience that the placenta had to be removed and so, after the baby was in the toilet "a little while", she expelled the placenta by putting pressure on her stomach. She did not notice whether the baby's head was under water, because the afterbirth fell over its head. It took two to three minutes for the placenta to come out. She then turned on the light and found a napkin and pinned it on herself. She then removed the baby from the toilet, picking it up by the feet, and cut the cord with a razor blade. She testified that the baby was limp and made no cry; that she thought it was dead; and that she made no attempt to tie the cord as she thought there was nó use. She then laid the baby on the floor and proceeded to take further care of herself and clean up the room. The baby remained on the floor about fifteen minutes after which she wrapped it in a newspaper and placed it under the bath tub to conceal it from her mother. She then returned to bed and the next day went about as usual, going to a carnival that evening. On the next day, April 1, her mother discovered the body of the infant under the bath tub.

An autopsy was performed by a physician. He testified that the cord on the baby was about eighteen inches long, untied and depleted of blood; that the baby would live until it bled to death, in this case about an hour; that the baby appeared to be a full nine-month child and weighed about six and one-half pounds; that it appeared normal in every respect; that the lips were dark and swollen, but blood had been extravasated out of the vessels into the tissues of the lips and cheeks; that the tongue was dark and appeared hemorrhaged; that he opened the chest and stomach; that the lungs appeared normal and had air in them, the texture of which could be followed; that there was "crepitation"; that the heart and liver and other internal organs appeared normal; and that the body had very little blood in it, indicating hemorrhage. He expressed the opinion that the child was born alive, based on conditions he found and the fact that the lungs contained air and the blood was extravasated or pushed back into the tissues, indicating heart action. Although he admitted, on cross examination, that certain things were possible, he gave his reasons for excluding them here and reaffirmed his opinion that this baby was born alive and that it had had independent lung and heart action.

The appellant first contends that there is no substantial evidence to support the verdict in that it does not sufficiently appear from the evidence that this infant was born alive and became a human being; that it appears from the testimony of another doctor, called by the defense, that the doctor performing the autopsy did not use certain tests which might have been used and did not open the infant's head and heart which this other doctor thought might disclose some possibilities; and that it follows that the question of whether this infant was born alive and became a human being rests entirely on pure speculation.

While the autopsy surgeon expressed the firm opinion that this child was born alive, giving his reasons therefor, he admitted that it was possible that the main factors on which he based his opinion, the inflation of the lungs and the evidence of heart action, could have resulted from the child's breathing after presentation of the head but before the birth was completed. In other words, before there was a complete separation of the child from the mother. The respondent has presented a very able review and analysis of the leading cases along this line from the older and the modern common law of England (Rex v. Poulton, 24 E.C.L.R. 590; Rex v. Enoch and Pulley, 5 Carr. & Pay. 539; 24 E.C.L.R. 696; Rex v. Eliza Brain, 6 Carr. & Pay. 349; 25 E.C.L.R. 468; Rex v. Elizabeth Sellis, 7 Carr. & Pay. 850; 32 E.C.L.R. 905; Rex v. Ann Crutchley, 7 Carr. & Pay. 813; 32 E.C.L.R. 887; Regina v. Reeves, 38 E.C.L.R. 27; Regina v. Ann Wright, 9 Carr. & Pay. 754; 38 E.C.L.R. 437; Regina v. Milborough Trilloe, 1 Carr. & Mar. 650; 41 E.C.L.R. 352; Rex v. Pritchard, 17 T.L.R. 310) and from other states in this country which still closely follow the common law rules in this regard. State v. Winthrop, 43 Iowa 519, 22 Am.Rep. 257; Morgan v. State, 148 Tenn. 417, 256 S.W. 433; Shedd v. State, 178 Ga. 653, 173 S.E. 847; Jackson v. Com., 265 Ky. 295, 96 S.W.2d 1014. While it would be interesting, in the interest of brevity it seems unnecessary to review these cases here. Some of these cases involve situations where an injury inflicted upon the mother resulted in the death of an unborn child. Others seem to be based upon such theories as that unattended childbirth is so violent a proceeding that the life of the child is in natural jeopardy or that the mother, because of momentary insanity or because of physical disability, should not be held responsible for a premeditated killing in the act of birth or for a death resulting from neglect after birth. For these and similar reasons, very stringent rules were developed at common law and have been largely followed in common law states in this country. Most of these jurisdictions have bridged the gap thus resulting by adopting various forms of infanticide statutes making the destruction of unborn infants or of infants not completely born a crime, but providing for a lesser punishment. While the matter was variously stated in these cases, and while some of them are somewhat inconsistent with others, it was generally held under the older common law that a child did not become a human being and could not be the subject of a homicide until it was completely born alive, was entirely separated from its mother and had an entirely independent life, with the cord cut and with its own breathing and heart action. Some of the cases have gone to ridiculous lengths, and others have varied some of the requirements, but these rules have largely been retained in the modern common law and in common law states in this country. While there have been some modifications of the rules these jurisdictions still require a rather complete separation from the mother and a rather complete demonstration that there was an entirely independent existence in the child before considering the infant as a human being, although in some of the more modern cases it has been held that the cutting of the cord was not necessary to this end.

Beyond question, it is a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense. There is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent upon its mother, the child, for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life. It is well known that a baby may live and grow when removed from the body of its dead mother by a Caesarian operation. The mere removal of the baby in such a case or its birth in a normal case does not, of itself and alone, create a human being. While before birth or removal it is in a sense dependent upon its mother for life, there is another sense in which it has started an independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being. While it may not be possible to draw an exact line applicable to all cases, the rules of law should recognize and make some attempt to follow the natural and scientific facts to which they relate. As Judge Cardozo once said: "Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light." There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed. While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed.

The question presented has not been decided in this state. Section 192 of the Penal Code provides: "Manslaughter is the unlawful killing of a human being, without malice * * *." In Scott v. McPheeters, 33 Cal.App.2d 629, 92 P.2d 678, 93 P.2d 562, it was pointed out that the theory under another statute that an unborn child is a human being separate and distinct from its mother is something more than a fiction and is based upon scientific fact, common experience and knowledge. In fact, it would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when it has reached that state of viability when the destruction of the life of its mother would not end its existence and when, if separated from the mother naturally or by artificial means, it will live and grow in the normal manner. In practical effect, the rules that have developed at common law furnish a presumption that the baby in question is, or will be, born dead. This presumption is not only contrary to common experience and the ordinary course of nature, but it is contrary to the usual rule with respect to presumptions followed in this state. Section 1963 (28) of the Code of Civil Procedure provides that, while it may be disputed, it is to be presumed "That things have happened according to the ordinary course of nature and the ordinary habits of life." While this presumption may not be sufficient for every purpose it is not only some evidence, but it suggests the proper manner of approach in considering all of the evidence.

[1] Without drawing a line of distinction applicable to all cases, we have no hesitation in holding that the evidence is sufficient here to support the implied finding of the jury that this child was born alive and became a human being within the meaning of the homicide statutes. That it became a human being does not rest upon pure speculation. The evidence is sufficient to support a finding, beyond a reasonable doubt, that a live child was actually born here, and that it died because of the negligence of the appellant in failing to use reasonable care in protecting its life, having the duty to do so. This baby was completely removed from its mother and even the placenta was removed. A factual question was presented and the opinion of the autopsy physician was evidence which could be considered by the jury. His opinion was that the baby was born alive and that it breathed and had heart action. He gave good reasons for that opinion and while he admitted that there could be a possible doubt his evidence justifies the inference that there was no valid ground for a reasonable doubt. While he admitted that he had not used certain tests suggested by the other doctor he stated that he knew of these tests but did not consider them necessary here. With respect to the test most relied upon by the defense, it was stated by both doctors that this test would show only what the autopsy physician testified he had discovered by other means. The doctor called by the defense had not seen the baby's body and his testimony was based upon his general laboratory experience. While it may be said that there was some conflict between the testimony of these two doctors no more than a conflict appears. The question was one of fact for the jury and, in our opinion, the evidence is sufficient to support its findings. If it could be said that there might be a possible doubt with respect to this phase of the case, it cannot be said that there was necessarily a reasonable doubt. The finding of the jury is sufficiently supported, and the implied finding that this was a human being rests on a factual basis and not upon speculation.

[2] The appellant further contends that the evidence is insufficient to show that the death of this infant was caused by a criminal act. It is argued, in this connection, that the autopsy surgeon was unable to state precisely what caused the death of the infant and that it follows that the question as to the cause of the death rests on speculation and conjecture. It is pointed out that this doctor gave as the cause of death both suffocation and hemorrhage from an untied umbilical cord, and that he admitted that it was very difficult to determine which of these actually caused the death. He described the conditions he found in the body of the infant, including certain things which indicated that suffocation had taken place and other things which indicated an excessive hemorrhage. While he testified that the cause of death was very likely hemorrhage he later stated that it could be both of these things. He reaffirmed his opinion that one or both of these things caused the death although he admitted the possibility that the baby could have died of brain

hemorrhage, saying "anything is possible." This doctor expressed a fixed opinion that the death resulted from one or both of these things and gave substantial reasons for that opinion. The fact that he was unable or unwilling to attribute the death to one of these causes alone does not make this evidence mere speculation or conjecture, and does not affect the question as to whether the death resulted from a criminal act.

[3, 4] There is ample evidence that such was the case. Penal Code section 192 defines involuntary manslaughter as the unlawful killing of a human being "In the commission of a lawful act which might produce death * * * without due caution and circumspection." The failure to use due care in the treatment of another where a duty to furnish such care exists is sufficient to constitute that form of manslaughter which results from an act of omission. People v. Montecino, 66 Cal.App.2d 85, 152 P.2d 5. While the circumstances here are distressing, the evidence indicates a complete failure on the part of the appellant to use any of the care towards this infant which was necessary for its welfare and which was naturally required of her. While it is conceivable that in some such cases the mental and physical condition of a mother, at the time, might prevent her from exercising that reasonable care which would ordinarily be required, and thus excuse her from blame for the consequences of her failure to act, no such situation here appears. The appellant's own testimony discloses not only that she had a full realization of the situation but that she was able to think clearly and act with definite ends in view. With plenty of assistance near at hand she intentionally chose not to call for any help. Although she knew that the baby had dropped into the toilet she made no effort to rescue it or care for it for some time. Knowing that the placenta should be removed she gave her first attention to that. Even after that was accomplished she got up, turned on the light and proceeded to care for herself. Only after this was done and some seven minutes after the baby was born did she pick up the infant and make any effort to observe its condition. Even then her actions were very perfunctory and she made no effort to do anything, or to call for aid, in order to take care of the baby and attempt to preserve its life. She then let it remain on the floor in a cold room for some fifteen minutes while she attended to other things, after which she put it in a newspaper and hid it under the tub. Even the appellant's own medical expert testified that a child born under these circumstances would die. The evidence is entirely sufficient to show that the death of this infant was caused by a criminal act.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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77 Cal.App.2d 634

In re KYLE.

Cr. 2442.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1947.

1. Judgment 🔑818(4)

A judgment of foreign court of general jurisdiction, regular on its face, is presumed to be valid in absence of evidence to contrary and carries presumption that court had jurisdiction. Code Civ.Proc. § 1963, subd. 16.

2. Divorce 🔑326

A decree of court of sister state awarding custody of child to divorced parties was entitled to full faith and credit in California subject to right of parties to show changed circumstances since decree.

3. Divorce 🔑326

California courts must enforce Nevada divorce decree for custody of children in absence of some affirmative showing justifying modification of decree.

4. Divorce 🔑332

A father residing in California and having had for five years custody of child presently aged 12 pursuant to Nevada divorce decree could bring habeas corpus proceeding to determine custody of child, against mother residing in California and refusing to return child to father after temporary visit to mother, without alleging that child was in imminent danger as to safety, health, morals, or welfare.

5. Divorce ⚷332

Father seeking to obtain child from divorced mother in habeas corpus proceeding need not allege unlawful imprisonment of child or that child is restrained of liberty, in view of allegations showing that father was awarded custody of child by foreign divorce decree and that child is held by mother in violation of such order. Pen. Code, §§ 1473, 1474.

6. Divorce ⚷327, 329

A divorced wife remarrying in reliance on Nevada divorce decree estopped herself to raise any question involving jurisdiction of Nevada court to sever ties of matrimony between wife and husband, and could not question husband's bona fide domicile in Nevada, and could not attack jurisdiction of Nevada court because of any fraud practiced on wife by husband.

7. Divorce ⚷326

A divorced wife remarrying in reliance on Nevada divorce decree could attack such decree only in respect to those matters having to do with jurisdiction of Nevada court to make binding order as to custody of children.

8. Divorce ⚷327

A divorced mother who refused to return child to father after temporary visit on ground that Nevada court did not have jurisdiction to award custody of child to father in divorce decree must allege in habeas corpus proceeding instituted by father to recover custody of child, facts sufficient to show affirmatively a want of jurisdiction of person of child in Nevada courts, and such burden was not met by mother's allegation that child was not living with father in the Nevada county in which complaint was filed and divorce decree was entered.

9. Divorce ⚷329

Jurisdiction to enter divorce decree awarding custody of child to father could not be attacked by mother in habeas corpus proceeding instituted by father to recover custody of child whom mother refused to return to father after temporary visit to mother, on ground that father fraudulently represented to mother that he would give mother custody of child whenever she was in a position to care for child, but decree might be modified in the superior court on such ground.

10. Divorce ⚷332

In habeas corpus proceeding by father residing in California to recover custody of child under age 14 from mother who resided in California and who refused to return child to father after temporary visit, wishes of child would not be considered, where custody of child was awarded to father by existing and unmodified Nevada divorce decree. Probate Code, § 1406.

11. Habeas corpus ⚷112

The rule that court will not make a coercive order in habeas corpus is a qualified rule only.

12. Divorce ⚷332

A parent residing in California and having custody of minor child under 14 under valid divorce decree of Nevada can, in habeas corpus proceeding, enforce such right of custody against other parent residing in California and refusing to return child after temporary visit, in absence of allegation supported by proof that welfare of child would be thereby jeopardized, and other parent, after restoring custody, can then proceed in superior court for an order changing custody of child upon any legal ground that the other parent may have.

* * *

Proceeding in the matter of the application of Robert M. Kyle for a writ of habeas corpus on the body of Norma Jean Kyle, a minor, opposed by Adelaide E. Kyle, now Adelaide E. Wiedrick.

Order in accordance with opinion.

Bronson, Bronson & McKinnon, of San Francisco, for petitioner.

Fitz-Gerald Ames, Sr., and Hugh B. Miller, both of San Francisco, for respondent.

DOOLING, Justice.

This is a proceeding in habeas corpus brought to recover the custody of a minor child. The writ having issued, a return was made thereto by the persons detaining the child, and the matter is now before the court for decision upon a demurrer and answer to the petition.

Petitioner Robert M. Kyle and respondent Adelaide E. Kyle, now Adelaide E. Wiedrick, were married on November 3, 1928. Of the marriage two children were born, Norma Jean Kyle and Robert S. Kyle. The present controversy concerns the custody of Norma Jean Kyle, now twelve years of age.

In 1941 Robert M. Kyle filed a suit for divorce in Nevada. Adelaide Kyle appeared through an attorney and filed an answer. The action was heard on September 6, 1941 and Robert M. Kyle was granted an absolute divorce and awarded the custody of the two children. This decree has never been modified or amended.

Both petitioner and respondent have remarried under the decree, and petitioner has had the custody of the children continuously since the entry of the decree. On September 1, 1946, upon request, petitioner allowed Norma Jean to visit respondents on condition that she should be returned to petitioner about September 5. When he later returned to get the child he was refused admittance and respondents refused to return the child to him. He then filed the present petition for a writ of habeas corpus.

[1] Respondents (Adelaide Wiedrick and her present husband) have filed exceptions to the sufficiency of the petition which amount to a demurrer. They first allege that as petitioner is basing his claim to custody on the Nevada decree, the petition is defective as it fails to allege that the Nevada court had jurisdiction to render the judgment and decree. However petitioner has pleaded the judgment and decree of the Nevada court which is regular on its face. Such a judgment and decree of a court of general jurisdiction is presumed to be valid in the absence of evidence to the contrary and carries the presumption that the court had jurisdiction. C.C.P. sec. 1963(16); In re Estate of Wiechers, 199 Cal. 523, 527, 528, 250 P. 397; McHatton v. Rhodes, 143 Cal. 275, 278, 279, 76 P. 1036, 101 Am.St. Rep. 125; Collins v. Maude, 144 Cal. 289, 293, 77 P. 945; Smith v. Moore Mill & Lumber Co., 101 Cal.App. 492, 496, 281 P. 1049; Luckett v. La Tour, 122 Cal.App. 271, 273, 9 P.2d 886. This is sufficient to withstand such attack by demurrer.

[2] Secondly they argue that our courts are not required, as a matter of comity, to give full faith and credit to the custody decree of a court of a sister state, citing Anthony v. Tarpley, 45 Cal.App. 72, 187 P. 779; Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556; and In re Culp, 2 Cal.App. 70, 83 P. 89. While there is language in these cases which gives colorable support to this argument it was not necessary to the decision of any of them. The rule which is binding upon us is stated in the later case of Foster v. Foster, 8 Cal.2d 719, at pages 727, 728, 68 P.2d 719, at page 722:

"This same rule that former decrees of custody may be modified only upon a showing of change of circumstances arising subsequent to the entry of the former decree applies with equal force to the question of the finality of the decree of custody of a sister state made and entered in a divorce proceedings. It has been so held in the cases of In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal. App. 716, 292 P. 285, 286; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206. The case of In re Livingston, supra, quotes with approval from In re Marshall, supra, and says: 'The quotation just set forth * * * indicates the rule generally prevailing that a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and subject of course to the right of the parties to show a change in the circumstnces or conditions, entitled to recognition in another state.' This same case also quotes with approval from a case note appearing in 20 A.L.R. [at page] 815, where the authorities on the subject are collected, as follows: 'With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.' * * *

"The trial court in the instant case, by an express finding, indicated that it felt itself bound by the doctrine of comity to give recognition to the decree of the South Dakota court and that, in the absence of a change of circumstances and conditions affecting the welfare of the child, the decree of the South Dakota court was entitled to full faith and credit in this state. Having determined, after hearing all the evidence adduced by both parties, that there had been no change of conditions affecting the welfare of the child, the trial court in the instant case refused to modify the decree of custody of the South Dakota court, and refused to grant to appellant the sole and exclusive custody of the minor child in contravention of the decree of the South Dakota court. It is evident that in so doing the trial court was supported by ample authority."

[3] Under this rule we are bound to enforce the Nevada decree for custody in the absense of some affirmative showing justifying its modification.

Thirdly they insist that habeas corpus is not the proper remedy to determine custody in the absence of an issue as to the welfare of the child, citing In re Dowell, 4 Cal.App.2d 688, 41 P.2d 596; In re Inman, 32 Cal.App.2d 130, 89 P.2d 421, and In re Culp, supra, 2 Cal.App. 70, 83 P. 89.

The three cited cases follow a consistent pattern. In each of them the mother was originally awarded custody of her child by the decree of court of a sister state, in each of them she later established a residence with her child in the state of California, and in each of them the court of original jurisdiction purported to modify its decree to take the custody of the child from the mother after her California residence with the child had been established. The validity of the modification order was questioned in each case and in Re Culp, supra, the court expressly held the order of modification void for want of jurisdiction. In the other two cases, without expressly passing on the validity of the order of modification, the courts held that they would not enforce by writ of habeas corpus an order of the court of a sister state made under such circumstances against a mother legally domiciled in this state. Whatever the rationale of those decisions they have no application to the facts of this case. It may be surmised that the courts were unwilling by the summary remedy of habeas corpus to take the custody of a child from a mother domiciled in this state to enable the petitioner to take the child out of the state and thereby put the mother to the expense and hardship of seeking redress in the courts of another jurisdiction when the question of custody could as well be determined in an action in the superior court of California similar to that prosecuted in Foster v. Foster, supra, 8 Cal.2d 719, 68 P.2d 719. That this is the basis of these decisions is suggested by the following language found in Re Dowell, supra, 4 Cal.App.2d 688, 689, 41 P.2d 596: "The respondent and the child residing legally in California, it will be presumed that the mother is in the rightful possession of her female child of tender years, and we do not understand that the writ of habeas corpus can be used to try an issue raised thereon. The trial courts are open for that purpose."

It may further be noted that in each of these cases the attempt was to take the child from a mother who had legally had custody of the child for an extended period of time.

[4] In these respects our case is the exact converse. Here both parties and the child reside in California. Here the father had custody for five years under the Nevada decree. The respondent mother, rather than go through the orderly processes to determine if there should be a change in the existing custody (Foster v. Foster, supra, 8 Cal.2d 719, 68 P.2d 719), has extrajudicially attempted to decide that question for herself. By refusing to return the child after a short permissive visit, she seeks to avoid her burden of showing that the custody order should be modified and to force petitioner, to whom the custody has once been awarded, again to prove that he is entitled to the custody of his child. In such a situation the petitioner is entitled to rely upon his decree for custody without alleging that the child is in some imminent danger as to her safety, health, morals or welfare. In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal.App. 716, 292 P. 285.

Respondents claim that the three cases last cited are old cases which no longer represent the rule in California. They were all cited with approval in Foster v. Foster, supra, 8 Cal.2d 719, 727, 68 P.2d 719.

[5] Finally in support of their demurrer respondents urge that the petition is defective in not alleging that the child is unlawfully imprisoned or restrained of her liberty. Secs. 1473, 1474, Pen. C. The allegations showing that petitioner has been awarded the custody of his child and that she is being held by respondents in violation of that order are sufficient to satisfy these requirements. 13 Cal.Jur. 252.

For the reasons stated the exceptions to the petition are overruled.

[6, 7] Turning to the return to the petition we find that respondents do not purport to raise any question as to the best interests of the minor child. Thus no such question as that presented in Re Landry, 61 Cal.App.2d 230, 142 P.2d 432, is here presented. Instead respondents content themselves with an attack upon the jurisdiction of the Nevada court which rendered the custody decree here in question. By remarrying in reliance upon that decree the respondent mother has estopped herself to raise any question involving the jurisdiction of the Nevada court, at least insofar as its jurisdiction to sever the ties of matrimony between the parties is concerned. Kelsey v. Miller, 203 Cal. 61, 263 P. 200; Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122. She is thus estopped to deny that the petitioner had a bona fide domicile in Nevada sufficient to support the jurisdiction of the Nevada court to grant a decree of divorce, and to attack the jurisdiction of the Nevada court to sever the bonds of matrimony because of any fraud practiced upon her by the petitioner. Her attack upon the decree must be limited to those matters having to do only with the jurisdiction of the Nevada court to make a binding order as to the custody of the children. Directed to this limited question, as to which we may assume, without deciding, that no estoppel exists, only two allegations of the return need be noticed.

[8] It is alleged in the return: "that at the time the complaint for said divorce was filed and at the time the decree was entered, the minor children of the parties, including Norma Jean Kyle were not living with petitioner in the County wherein said divorce complaint was filed and wherein said decree was entered." Since the decree carries the presumption of jurisdiction (cases cited to this point supra) it is incumbent upon respondents to allege facts sufficient to show affirmatively a want of jurisdiction of the person of Norma Jean in the Nevada court. The allegation above quoted is not sufficient for this purpose. It is a perfect example of a negative pregnant in affirmative form. If Norma Jean was domiciled in Nevada at the time the decree was entered that clearly would be sufficient to give the Nevada court jurisdiction to award her custody to petitioner. The al-

legation that she was not living with petitioner in the county wherein the complaint was filed and the decree entered is not a denial that she was living in that county, but only a denial that she was living *with petitioner* in that county. 21 Cal. Jur. 153–155. The burden is on the party alleging want of jurisdiction and that burden is not met by such an evasive allegation. 15 Cal.Jur. 40. If the minor was actually not living in Nevada, but in California for example, the fact could and should have been unequivocally alleged.

[9] The only other allegation which needs to be noticed is that petitioner fraudulently represented to respondent mother that he would give her the custody of the child whenever she was in a position to care for her. This might be ground for modifying the decree and the superior court is open to respondent for that purpose under Foster v. Foster, supra, 8 Cal. 2d 719, 68 P.2d 719. It does not go to the jurisdiction of the court to enter the original decree.

[10, 11] An affidavit of the child has been filed in which she states that she prefers to live with respondents. It is argued: That the wishes of the child, although under fourteen, are properly to be considered in making an award of custody. In re Christal, 141 Cal. 523, 75 P. 103; In re De Leon, 59 Cal.App.2d 510, 139 P.2d 109; sec. 1406, Prob. C. The wishes of the child might well be a consideration in a proceeding to change custody in the superior court, but we are only concerned here with the enforcement by one parent resident of California against another parent likewise residing in California of an existing and unmodified custody decree. It is also argued that the court will not make a "coercive order" in habeas corpus. In re Gates, 95 Cal. 461, 30 P. 596; In re De Leon, supra, 59 Cal.App.2d 510, 139 P.2d 109. The rule is a qualified one only. See In re Mathews, 176 Cal. 156, 167 P. 873, where the court said, referring to In re Gates, supra, at page 158 of 176 Cal., at page 874 of 167 P., in enforcing an order for custody by habeas corpus: "If it be sound doctrine that a court or judge may, on habeas corpus, disregard an established right which would control the judgment in any other form of proceeding, we are nevertheless satisfied that the rule can have no just application here.'

[12] We wish to be understood as going no further in this decision than to hold that as between two parents, both resident in California, the parent who has the custody of a minor child under fourteen years of age, under a valid decree of another state, may enforce his right of custody so given against the other parent who has had the child for a temporary visit and refuses to return her, in the absence of allegation supported by proof that the welfare of the child will be thereby jeopardized. The mother is not foreclosed by this decision from proceeding in the superior court for an order giving to her the custody of her child upon any legal ground that she may have after first restoring custody of the child to the father. A due regard for orderly procedure requires that this court should enforce the petitioner's established right to the custody of his child.

Respondents are ordered to deliver the minor, Norma Jean Kyle, to petitioner.

NOURSE, P. J., and GOODELL, J., concur.

77 Cal.App.2d 605

PEOPLE v. WILLMURTH.

Cr. 578.

District Court of Appeal, Fourth District, California.
Jan. 10, 1947.

Rehearing Denied Jan. 24, 1947.
Hearing Denied Feb. 6, 1947.

1. Criminal law 🔑511(3, 7)

In considering question of corroboration of an accomplice, relationship of parties and their acts and conduct are competent evidence to be considered, and, since corroboration need not be by direct evidence, defendant's entire conduct may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, corroboration is sufficient, and such independent corroborative evidence may consist of contradictory statements by accused or his silence in face of accusatory statements, or false statements made in connection with matters connected with commission of crime. Pen.Code, § 1111.

2. Criminal law 🔑511(1)

Independent evidence was sufficient to corroborate testimony of defendant's alleged accomplice and to sustain conviction for second-degree burglary.

3. Burglary 🔑45

In burglary prosecution, question of weight and sufficiency of evidence was rightfully left to jury.

4. Criminal law 🔑406(1), 407(1)

If a defendant responds to an accusatory statement, made in his presence by a third person, with a flat denial, there is no admission by defendant and statement may not be received in evidence against him, but, if truth of statement is admitted by defendant, admission may properly be introduced, or, when accused stands mute in face of accusation or responds with an evasive reply, both accusation and fact of defendant's failure to deny are admissible under certain circumstances.

5. Criminal law 🔑407(1), 1172(2)

In burglary prosecution, evidence that third person, in defendant's presence, stated that defendant went with third person to burglarize store in question, and that defendant made no reply but merely shook his head, was admissible, and instructions concerning effect of such accusatory statement and defendant's reaction thereto were not prejudicially erroneous. Code Civ.Proc. § 1870, subd. 3.

6. Criminal law 🔑1186(4)

Prosecutor's question to state's handwriting expert if he was furnished with exemplars, and witness' answer that some specimens of handwriting were furnished him, and that he also went to probation office and examined some specimens there of handwriting of defendant, did not constitute prejudicial misconduct as showing defendant's previous conviction of a felony, where there was no motion to strike, answer was a voluntary and unsolicited remark and was not proof that defendant had been convicted of a felony. Pen.Code, § 1025; Const. art. 6, § 4½.

7. Criminal law 🔑1036(1)

Defendant could not raise for first time on appeal alleged error in state's improper introduction of evidence that woman with whom defendant had been living as his wife was not married to defendant.

8. Criminal law 🔑696(2)

Trial court has no duty to cause improperly admitted evidence to be stricken in absence of a proper motion by defendant to have such evidence stricken.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Delmar Willmurth was convicted of burglary in the second degree, and he appeals.

Affirmed.

Albert G. Bergman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., of San Francisco, and Tom Scott, Dist. Atty., and Vincent P. DiGiorgio, Deputy Dist. Atty., both of Bakersfield, for respondent.

GRIFFIN, Justice.

Defendant was charged with the crime of burglary, occurring on or about March 7,

1946. He was tried by a jury and found guilty of burglary of the second degree. He was also charged with and admitted a prior conviction of a felony, the crime of possessing molds for counterfeiting coins and having served a sentence therefor in a Federal prison camp.

Sometime between February 28 and March 7, 1946, the store building of Sasia and Wallace, in Bakersfield, was burglarized. A check protector and leaves of company checks were removed from the premises. The check protector was later returned. Several of these checks were made out for the amount of $78.19 and were negotiated.

On March 9, 1946, one of the checks, payable to Jesse Davenport, signed "Lem D. Wallace," was brought to the attention of Mr. Wallace, one of the members of the firm of Sasia and Wallace. He recognized that the signature was not his. A call came from the Circle Bar to the effect that a man was trying to pass his company's check there. Officer Jones drove to the Circle Bar where one Fred Johnson was standing around waiting to receive money from the check he had just cashed. Defendant Willmurth was present in the bar at the time. In his attempt to put Johnson under arrest, after he showed considerable resistance and endeavored to escape, the officer shot him. He later died.

A bartender at Gene's Bar, who had cashed the first check for $78.19, about 2 p. m. on March 9, 1946, testified that he knew the deceased, Johnson, by reason of his coming into the bar; that he "knew him as Jesse Davenport"; that defendant Delmar Willmurth was with him at that time and was wearing dark glasses.

Johnson also cashed a similar check at Beebe's Bar between 12 noon and 2 p. m. and bought a pint bottle of Southern Comfort liquor. About 2:30 p. m. Johnson called at the home of one Dorothy Deaton, in a blue Mercury coupe which was owned by defendant Willmurth. Some man wearing dark glasses waited for Johnson outside of the house in the coupe. According to her testimony, Johnson came to pay Dorothy Deaton's husband some money he owed him. At 3 p. m. Johnson, defendant Willmurth and the accomplice Arthur J. Stewart who testified against Willmurth, were seen together at the River Cafe, a short distance from the Circle Bar. Defendant Willmurth testified at the preliminary examination that he had not seen Johnson that day but that he just happened to be at the Circle Bar at the time of the shooting. He did not take the stand at the trial.

The evidence indicates that defendant Willmurth was driving Johnson around from bar to bar in his blue Mercury coupe. A small bottle of Southern Comfort liquor was later found in Willmurth's car at the time of his arrest. These facts were proved independently of the testimony of any accomplice.

Arthur J. Stewart, after pleading guilty to the identical charge, testified that he had known Johnson for about five years; that he lived with him on occasions; that they had been roaming around together for the last twelve days; that he had known Willmurth since March 7th; that he met him with Johnson at Pete's Cafe; that they talked a while and then the three of them went in Willmurth's car to Willmurth's house and had a few drinks; that about 7:30 p. m. the three of them went to Sasia and Wallace's store building; that on the way Willmurth told Johnson something about some checks at that store; that they parked the car; that Willmurth had a little pencil flashlight and a large screwdriver with a yellow handle with him; that they tried to open one of the windows in the store and finally Willmurth opened one of them from the top; that Johnson and Willmurth went inside and told him to keep watch outside; that they were in there about 10 minutes and came out with the check protector and numbered leaves of checks with the name of Sasia and Wallace, Inc., printed on them; that they all got in the car and went to Willmurth's house and that was the place where the checks were made out and Willmurth ran them through the check protector; that Johnson started to fill out a couple of them but that they didn't "look so good," so they disposed of those two; that Willmurth then said he would have someone else make them out the next day; that the three went back to the store building and that he and Johnson replaced the check protector; that they met the next day and the day following; that Johnson and Stewart met at the River Cafe and Willmurth came in later; that Johnson walked off down the highway and Willmurth picked him up; that the next day he heard that Johnson was hurt; that Willmurth left word for Stewart to meet him; that they met and Willmurth told him to keep still about what happened. A flashlight, identified by the witness as being the same size and color as that used by defendant, was found in defendant's car and was received in evidence.

Mr. Wallace testified that he discovered screwdriver marks or indentations on the window sill; that screws were pulled up out of the window latch, but that he was unable to determine whether anybody made entry or whether they were frightened off at that time. He fixed the date of this discovery as of February 28, 1946. At that time he did not look to see if any blank checks were missing from the back of the check book.

In addition, the evidence shows that Stewart, soon after the shooting, left town and later returned and confessed. He was arrested and taken to the hospital for identification by Johnson. Johnson was quite ill and in bed. He had a tube of some description in his nostrils.

It was brought out by counsel for defendant that the deputy sheriff "asked Johnson if he recognized Stewart and he said 'yes'"; that he asked him "what the cut was to be, if there was to be a cut, and Johnson said '50-50.'" In rebuttal, the deputy testified that "Johnson and Stewart were talking. Johnson told Stewart, he says: 'I think that this is it.' He says: 'When I go I want to go with a clear record.' He says: 'I have told my whole story.' At that time I asked Johnson in regard to how they were going to split the proceeds from their check cashing or forgery. He says: 'It was sixty-five to thirty-five.' Willmurth would get sixty-five per cent and he and Stewart would split their portion, thirty-five per cent, fifty-fifty."

Defendant Willmurth was thereafter placed under arrest and taken to the hospital for identification by Johnson. The officer testified, over objection, that he "asked Johnson if this man here, indicating Willmurth, was the man that went with he and a party by the name of Stewart to the firm of Sasia and Wallace, 230 South Union Avenue, for the purpose of burglarizing the checks and steal a check protector and some blank checks. He answered 'Yes.' I stood there for just a few seconds and walked out in the hall with Willmurth. Q. At that time, while you were in the room, did Mr. Willmurth make any reply whatsoever? A. No, he kind of shook his head, then out in the hall he says to me * * * A. Willmurth said he didn't know what it was all about," He was then returned to the identification bureau where Stewart had given a detailed statement of the burglary. Willmurth was brought into the room where Stewart was seated and according to the officer's testimony, Stewart spoke to Willmurth and called him by name. Stewart said to him: "Willmurth, you might as well come clean, Johnson has told the story and so have I." Nothing else was said at that time but "The defendant kind of grinned and shrugged his shoulders." And they took the defendant back to the jail. A shorthand reporter was present and took down the conversation. It was in part as follows:

"Q. (By Mr. Fisher, deputy sheriff): Mr. Stewart, you have just given us a statement in regards to the office burglary of Sasia and Wallace, 240 South Union Avenue.

"Mr. Stewart: Yes, Sir.

"Mr. Fisher: In regards to the blank payroll checks being stolen and the check protector, and being taken to a man's house, and you have named a party by the name of Fred Johnson.

"Mr. Stewart: Yes.

"Q. And who was the other party? A. Delmar. (Indicating) This man here.

"Q. This man here. Delmar Willmurth? A. Yes, sir.

"Q. That was the man that was with you? A. Yes, sir.

"Mr. Stewart: I was just up and talked to Fred, and he told these boys about the deal. A. (No answer from Mr. Willmurth.)"

An examiner of questioned documents, Mr. Clark Sellers, testified that the Company's "check protectograph," admitted in evidence, was the machine used in "check protectographing" each of the eight checks in evidence; that the handwriting on the checks was not the handwriting of any of the three mentioned persons, except the endorsement of "Jesse Davenport" was in the handwriting of Fred Johnson.

The first contention made on this appeal is that the evidence is insufficient to support the verdict or judgment of conviction for the reason that the evidence offered to corroborate the testimony of Arthur J. Stewart, an accomplice, falls short of the requirements of section 1111 of the Penal Code, citing such cases as People v. Sawaya, 46 Cal.App.2d 466, 115 P.2d 1001; People v. Ciani, 104 Cal.App. 596, 286 P. 459; People v. Gilbert, 30 Cal.App.2d 321, 86 P.2d 135; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Bacos, 14 Cal. App.2d 338, 58 P.2d 221; and the general rule laid down in 4 Cal.Jur.Ten Year Supp. p. 705, et seq., secs. 255, 256, and 257.

[1] In considering the question of corroboration, the relationship of the parties and their acts and conduct are competent evidence to be considered, and since corroboration need not be by direct evidence, the entire conduct of defendant may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient, and such independent corroborative evidence may consist of contradictory statements made by the accused or his silence in the face of accusatory statements, or false statements made in connection with the matters connected with the commission of the crime. People v. King, 40 Cal.App.2d 137, 104 P.2d 521; People v. Rice, 29 Cal. App.2d 614, 85 P.2d 215; People v. Ross, 46 Cal.App.2d 385, 116 P.2d 81.

In the light of these general rules let us examine the evidence. It has been conclusively shown that sometime between February 28, 1946, and March 9, 1946, a burglary was committed and blank checks were taken from the store building of Sasia and Wallace. The evidence is also conclusive that some of these checks, which were stolen from Sasia and Wallace, were seen in the possession of and cashed by Johnson. Apparently, Johnson admitted his part in the burglary, and on his death bed, he involved both Stewart and defendant Willmurth. Stewart has pleaded guilty to the charge and had been sentenced to serve a term in the County road camp at the time of the giving of his testimony. From a reading of the entire transcript, we have not found that his testimony has been otherwise materially impeached. The evidence is also well established that Willmurth was with both of the other men on the day of the burglary and was suspiciously seen, with dark glasses on, in several of the bars, with Johnson, and was seated beside him in conversation when he was cashing some of the checks obtained in the burglary. He was also seen driving his blue Mercury coupe with Johnson in it. It was positively identified by other witnesses. Stewart testified that a pencil flashlight was used by Willmurth in entering the store building. An identical pencil flashlight was found in the Willmurth car at the time of his arrest. This is one outstanding circumstance that the jury had the right to consider. Also, the window sills had impressions made by a screwdriver, even though there is some irregularity regarding the date they were made.

Stewart testified that entrance was gained through the upper half of the window and that the check protector was returned to the office. These facts stand corroborated by other witnesses. Defendant was identified by Johnson, in the hospital, and by his answer to the officer's question, Willmurth was directly accused of having a part in the burglary. It is not clear whether defendant, in the *presence of the accuser,* admitted, denied, or evaded the accusation. He was later confronted with the accusation of the co-conspirator, Stewart, who directly accused him of being a participant in the burglary, to which accusation defendant failed to respond.

By way of further corroboration of the testimony of the accomplice defendant, at the coroner's inquest, testified that he had not seen Johnson on March 7th at any place except the Circle Bar; that he knew Johnson only "slightly" and that he did not know it was Johnson who had been shot until he read about it in the paper the next day. These statements were clearly established to be false and untrue. Further, the Southern Comfort liquor, purchased by Johnson, was found in Willmurth's car.

Stewart testified that the checks were written by Willmurth on the check protector which belonged to Sasia and Wallace. The examiner of questioned documents corroborated the fact that they were written by this particular machine. All of this evidence was unexplained by the defendant.

In People v. King, 40 Cal.App.2d 137, at page 141, 104 P.2d 521, at page 523 this court said:

"The entire conduct of the accused may be looked to for corroborative circumstances and if therefrom his connection with the commission of the crime may be fairly inferred the corroboration is legally sufficient. * * *. Where the defendant makes no attempt, by his own testimony or otherwise, to contradict, explain or deny any of the circumstances established against him, the jury is entitled to consider those circumstances in determining his guilt. (Citing cases.)"

[2, 3] We are convinced that the independent evidence sufficiently corroborates the testimony of the accomplice Stewart. People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991; People v. Malone, 25 Cal.App. 764, 145 P. 550; People v. Ross, supra; People v. Rice, supra; People v. Wiley, 33 Cal. App.2d 424, 91 P.2d 907; People v. Ward, 40 Cal.App.2d 143, 104 P.2d 537. The question of the weight and sufficiency of the evidence was rightfully left to the jury. People v. Yeager, 194 Cal. 452, 486, 229 P. 40.

The second point raised involves the question of the admissibility, over objections, of the accusatory statement made at the hospital in the presence of Johnson and defendant Willmurth, and of his reply thereto. It is argued that there was no accusatory statement, as such, made in defendant's presence, which called for a reply from him; that if it was such, that he denied it and therefore the prosecution was precluded from placing such evidence before the jury. It will be remembered that defendant was taken to Johnson's room for the purpose of identification. There the officer, in Willmurth's presence, asked Johnson if he was the man who went with him, for the purpose of burglarizing the described store and that Johnson answered "yes." The officer testified that Willmurth made no reply whatsoever. "He kind of shook his head." The record does not indicate in what manner he shook his head and what he intended to indicate by his actions. It cannot be said that defendant, in the presence of the accuser, intended to and did flatly deny such accusations in such a manner as would be expected from an innocent man accused of such participation. The least that can be said is that he waited until he was outside in the hall, out of the presence of the accuser, before he remarked that "he didn't know what it was all about."

[4] Defendant cites some of the latest expressions of the Supreme Court on the subject and relies principally upon People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. There it was held, by the majority decision, that such statements are hearsay unless they come within the exceptions to the rule: (1) That if a defendant responds to an accusatory statement, made in his presence, with a flat denial, there is no admission and the statement may not be received in evidence; (2) that if, on the contrary, the truth of the statement is admitted, the admission may properly be introduced; and (3) when the accused stands mute in the face of the accusation or responds with an evasive or equivocal reply, in that situation it has been held that under certain circumstances both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt, and that the theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial; that

where his response is silence, evasion or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statements, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty conscience; that where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted, but merely as a basis for showing the reaction of the accused to it. (Citing cases.)

The trial court, in the instant case, determined, by its ruling, that the import of the accusation and the defendant's reply thereto, might furnish a foundation for proof of conduct. It was then for the jury to decide whether the accused was aware the statements or accusations were made, whether, under all of the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or a consciousness of guilt.

The trial court instructed the jury "that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge,—and unless you are convinced beyond a reasonable doubt that the defendant did stand mute when the accusatory statements were made, such statements should be entirely disregarded by you * * * that if you believe beyond a reasonable doubt that the defendant was afforded a fair opportunity to deny accusations by accomplices and that he failed and refused to so deny but remained silent then 'his conduct and his silence in the face of accusatory statements sufficiently corroborates the charge of the accomplices.'" People v. Collins, 4 Cal. App.2d 86, 87, 40 P.2d 542.

In an instruction requested by defendant, the trial court instructed the jury "that in considering the evidence in this case in connection with any instructions I have given you on the subject of accusatory statements, the entire conduct of a person, allegedly accused should be taken into consideration by you. In this respect you may judge for yourself whether a question asked of a person by a police officer in the presence of a defendant calls for an answer or reply by the defendant * * *."

[5] The defendant claims the prosecution's instructions were erroneous. We perceive no prejudicial error in the instructions as given, and there was no abuse of discretion on the part of the trial court in allowing this evidence to go to the jury under those instructions. Sec. 1870, subd. 3, Code Civ.Proc.; People v. Yeager, supra; People v. Orloff, 65 Cal.App.2d 614, 151 P.2d 288.

This same conclusion must be reached as to the claimed accusation made by the accomplice Stewart in the presence of the defendant, at which time no denial was made by him.

The next complaint is directed to the failure of the trial court to grant defendant's motion for a mistrial, predicated on the following questions and answers.

On arraignment defendant admitted a prior conviction of a felony in the Southern District of California, Northern Division, on April 3, 1939, and that he served a term of imprisonment in the Federal Prison Camp at Tucson, Arizona. Clark Sellers, who testified as to the handwriting of the three persons involved in the claimed burglary, after being recalled by the people for further examination, testified as follows:

"Q. (By Mr. DiGiorgio) In examining the documents, did you examine them for any other purpose than the protectograph writing? A. Yes.

"Q. What was that? A. I examined the typewriting to determine if I could what typewriter was used, the typewriting on the face of them. I examined the signature Glen D. Wallace, which is seen in evidence in Exhibit No. 1, and I examined the endorsement on the back where the same reads Jesse Davenport. I made those examinations in addition to examining the check protectograph.

"Q. Were you furnished with exemplars in connection with those checks? A. Yes, of the handwriting, not of the typewriting. I notified the District Attorney's office that the typewriting, I think I notified them that each check was written on a Corona typewriter, but no specimens of a Corona typewriter were furnished to me to compare with the typewriting on the face of the checks. Some specimens of handwriting were furnished to me and I also went to the United States probation Office in Los Angeles and examined some specimens there of handwriting.

"Q. Of what individuals, who were the individuals? A. I examined in my office and at the United States Probation Department Office specimens of the handwriting of the defendant, Mr. Willmurth. I examined in my office specimens of the handwriting of Fred Johnson and I examined in my office the handwriting of Arthur J. Stewart * * *. A. I could not identify the defendant Mr. Willmurth as having written the name of Glen D. Wallace on the face of these checks. I could not identify Arthur J. Stewart as having written the name Glen D. Wallace on the face of these checks. * * *"

No objection was made to the questions propounded and no motions to strike any of the above-mentioned testimony were made by counsel for the defendant.

After considerable evidence had been taken and at the close of the day's session, counsel for defendant moved the court for a mistrial. This motion was presented at that time, apparently through some understanding with the court that such right had been reserved. The motion recited that *Mr. DiGiorgio* was guilty of *prejudicial misconduct* in asking of Mr. Sellers a question which he knew would call for an answer indicating that the defendant had previously been convicted of a felony and later placed on probation, in violation of section 1025 of the Penal Code.

[6] There is nothing in the question as propounded, that would indicate to us that Mr. DiGiorgio sought by the question asked any reference to the fact that the defendant had been previously convicted of a felony. The answer, so far as the record is concerned, was a voluntary and unsolicited remark of the witness in response to a legitimate and fair question. In and of itself, it may have indicated by inference, that the defendant might have had some reason to have an exemplar of his handwriting in the United States Probation Office in Los Angeles. This fact, standing alone, would not be proof that defendant had been convicted of a felony and had served time in a Federal prison or camp. No motion to strike the voluntary answer was made and no opportunity was given the trial judge to strike the portion referred to nor to admonish the jury in respect to it. Standing alone, the statement made by the witness would not necessarily have been considered prejudicial misconduct on the part of the deputy district attorney. The ruling of the court on the motion for a mistrial on that ground was proper.

The contention that that evidence did have some impression on the jury receives some support from the question later propounded by the jury foreman. After the jury had retired and after several hours of deliberation, it returned into court and the foreman asked to have that portion of the testimony re-read. The trial court ordered all of the testimony of Mr. Sellers re-read. Counsel for defendant again moved for a mistrial on the same ground previously urged. This motion was denied. Later, the jury returned a verdict of guilty of burglary of the second degree. A motion was later made to set aside the verdict on that ground. The motion was argued and denied. On a motion for new trial the same prejudicial misconduct of the district attorney was claimed. Some of the other questions here presented on appeal were set forth in the motion for new trial and after due deliberation, the trial court denied the motion.

Section 1025 of the Penal Code provides that "the charge of the previous conviction (set forth in the information) must not be read to the jury, nor alluded to on the trial." From the record, it can hardly be said that the particular *felony described in the information* was alluded to on the trial. The fact that defendant may have had an exemplar of his handwriting in the office of the United States Probation Office could not establish that fact. There are many reasons why it may have been there. It was only by inference that counsel for defendant could draw his conclusion that the allusion to the handwriting in the United States Probation Office established the fact that the defendant had been previously convicted of a felony. It is unfortunate that this testimony crept into the record. If the trial court believed it influenced the jury in its deliberations it was at liberty to grant a new trial. Apparently, it believed otherwise, and we are not prepared to say, as a matter of law, that the trial court should have granted defendant's motion for a mistrial, or the motion for a new trial based on the ground of *prejudicial misconduct of the deputy district attorney.* This was a matter of sound judgment and discretion for the trial court to exercise. He was familiar with all of the facts of the case. This is not a case where the prosecuting attorney asked a defendant questions which he knew were inadmissible and wrong, or where the questions asked of the witness were asked with the clear purpose of prejudicing the jury against the defendant, as was done in People v. Wells, 100 Cal. 459, 34 P. 1078. At no time during the trial did defense counsel object to this testimony or move that it be stricken, or ask that the jury be instructed to disregard it. When the jury returned and asked to have that portion of the testimony read to them, counsel for the defense did not raise his voice to object, but sat quietly by and permitted the court to have the objectionable portion read. If counsel had made a timely motion to strike, at the time the evidence was offered, the testimony could have been stricken from the record and then it would not have been read back to the jury. It would have had instructions to disregard the testimony and it would, no doubt, have done so. In the absence of an objection or motion to strike the answer as given, we are not prepared to hold that the ruling on the second motion for mistrial was prejudicially erroneous. People v. King, 13 Cal.2d 521, 526, 90 P.2d 291; People v. Stone, 199 Cal. 610, 250 P. 659; People v. West, 215 Cal. 87, 96, 8 P.2d 463; People v. Mancuso, 23 Cal.App. 146, 147, 137 P. 278; People v. Krug, 10 Cal.App.2d 172, 174, 51 P.2d 445.

Defendant claims, as reversible error, the conduct of the deputy district attorney in calling Mrs. Willmurth to the witness stand and asking the following questions:

"Q. What is your full name, please? A. Dorothy Willmurth.

"Q. Are you actually related to this defendant in any way? A. Yes, sir.

"Q. How? A. I am his wife.

"Q. Where were you married? A. Shafter, California.

"Q. When was that? A. All right, sir, we are not married.

"Q. Are you acquainted with Mr. Willmurth? A. Yes, sir.

"Q. How long have you known him? A. Three and a half years approximately. * * *

"Q. Were you present at the time Mr. Willmurth was arrested? A. Yes, sir. * * *

"Q. Will you tell us what occurred that day? A. Yes, sir. * * *

"Q. Do you know where Mr. Willmurth was that afternoon of Saturday, March 9th? A. Yes, he was home. * * *

"Q. Was he home all afternoon? A. That is right.

"Q. What kind of a car did Mr. Willmurth have? A. It was a 1941 Mercury.

"Q. What color is that car, if you know? A. Blue.

"Q. How long have you been staying there with Mr. Willmurth? (Objection by Mr. Bergman).

"Mr. DiGiorgio: Withdraw the question. * * *

"Cross-Examination. By Mr. Bergman:

"Q. Mrs. Henry, I don't like to pry into your private life, but these questions have been asked, I don't intend to embarrass you. You have been living with Mr. Willmurth as husband and wife for how long? A. Three years.

"Q. When you first met Mr. Willmurth did he at any time immediately after you began living with him as his wife or before, ask you to marry him? * * *

"Q. What? A. Mr. Willmurth asked you to marry him when you first met him? A. Yes.

"Q. Was there any reason, if you know, why you didn't marry him? A. Yes, sir. * * * Because I married a man and after I married him I found out he was already married, so I left him. There was nothing done about it, I didn't know what to do so I didn't know whether I was married or whether I wasn't."

[7] The evidence of the witness was not very beneficial to the people. It related to the ownership and description of defendant's car, the time when he quit working, and her endeavor to establish an alibi for the defendant. It did incidentally show the conditions under which the defendant and the witness were living. This was not particularly material to the issue. No objection was made to the questions propounded, nor was any motion made to strike the answers given. In fact, on cross-examination, counsel for defendant himself accentuated the fact of the illicit relationship. If defendant had established that this evidence had been offered for the direct purpose of prejudicing the jury in this respect, and proper objection been made thereto, or a timely motion to strike the objectionable answer had been made, and the trial court had been afforded an opportunity to rule upon them and admonish the jury in respect thereto, we would be more impressed by defendant's argument. People v. Dollor, 89 Cal. 513, 26 P.2d 1086; People v. McAlpine, 25 Cal.App. 727, 728, 145 P. 152; People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Gonzales, 69 Cal. App. 609, 231 P. 1014; People v. Morrell, 28 Cal.App. 729, 153 P. 977; 8 Cal.Jur. 500, sec. 516. This claim of error should not be raised for the first time on appeal. Story v. Nidiffer, 146 Cal. 549, 80 P. 692; People v. Owens, 123 Cal. 482, 56 P. 251; People v. Schafer, 161 Cal. 573, 119 P. 920; 8 Cal.Jur. p. 503, sec. 517.

[8] We have made a complete study of the entire record, including the transcribed copy of counsels' arguments in this court. There was certain evidence received that should have been, upon proper motion, stricken from the record. It was not the duty of the trial court to cause such evidence to be stricken unless its attention was called to that evidence by a proper motion. We therefore must conclude that there was competent evidence supporting the judgment of conviction, and we are not prepared to hold that defendant did not have a fair and impartial trial. The evidence of defendant's guilt was sufficient to uphold the judgment under section 4½ of Article VI of the Constitution of California, and it does not affirmatively appear that there has been a miscarriage of justice.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

29 Cal.2d 535

In re LEACH'S GUARDIANSHIP.
LEACH v. McCALLOM.

S. F. 17199.

Supreme Court of California, in Bank.
Dec. 26, 1946.

1. Guardian and ward ⚷161

An order awarding attorney's fees in guardianship proceeding, but containing no reference to settlement of account, was not appealable, in absence of any reference to orders allowing attorney's fees in statute covering appealable orders in guardianship proceedings. Probate Code, §§ 1240, 1630.

2. Guardian and ward ⚷161, 162

The question of proper allowance of attorney's fees in guardianship proceeding may be determined upon settlement in trial court of account of guardian and may be reviewed on appeal from order of settlement. Probate Code, § 1630.

◆

Proceeding in the matter of the guardianship of the person and estate of William Ronald Leach, a minor, wherein notices of appeal from order allowing E. Mae McCallom, as special guardian of the person and estate of William Ronald Leach, certain amounts as attorney's fees, expenses, and costs were filed on behalf of the minor by his sister Patricia Lee Leach, and by Guy R. Crump, as guardian ad litem, and wherein the special guardian filed a motion to dismiss the appeal.

Appeal dismissed.

Wood, Crump, Rogers & Arndt, Guy Richards Crump, and Stanley M. Arndt, all of Los Angeles, for appellant.

Samuel L. Kurland, George R. Maury, and Alfred C. Ackerson, all of Los Angeles, for respondent.

SHENK, Justice.

This is a motion to dismiss the appeal in case numbered L. A. 19511. The lower court made an order allowing respondent, E. Mae McCallom, as special guardian of the person and estate of William Ronald Leach, a minor, certain amounts as attorney's fees, expenses and costs. Notices of appeal were filed on behalf of the minor by his sister, Patricia Lee Leach, and by Guy R. Crump, as guardian ad litem, and respondent then made this motion to dismiss on the ground that notice of appeal was not filed in time. It was further contended that the order was nonappealable.

This matter is one of several proceedings relating to the guardianship of the minor and his sister, Patricia Lee Leach. The underlying controversy involved in this appeal is a dispute over the amount awarded as attorney's fees, but it will be helpful to an understanding of the nature of the order, and the problem presented, to set forth some of the background of the proceeding.

William Ronald Leach, the minor, and his half-sister Patricia, also a minor, owned an estate consisting of the capital stock of Leach Relay Company having an approximate value of $600,000. F. Paul Hornaday, testamentary nominee, was appointed general guardian of their persons and estates in September, 1942. On April 13, 1944, respondent McCallom, maternal grandmother of the minors, filed a petition praying that she be appointed guardian ad item of William for the purpose of protecting his interests against a proposed sale by Hornaday, the general guardian of the minor's stock to a corporation in which it was alleged Hornaday had or was to have a controlling interest. (The respondent grandmother also filed a similar petition on behalf of the other minor, Patricia.)

As prayed for in her petition, respondent was appointed guardian ad litem of William, and on the following day (April 14, 1944) she filed written objections to Hornaday's petition for instructions concerning the proposed sale of stock, alleging adverse interest on the part of Hornaday and that an unconscionable fraud would be perpetrated on William if such sale were consummated. Two weeks later (April 27, 1944), respondent filed a supplemental petition requesting permission to institute a proceeding to remove Hornaday as general guardian for failure to file an inventory or accounting and for alleged waste. Respondent was authorized to institute such a proceeding, and on the same day (April

27, 1944) she filed a petition for removal of Hornaday as general guardian and for her appointment as successor guardian, alleging various grounds of fraud, waste and mismanagement. She also filed a supplemental petition alleging waste and mismanagement. (Similar petitions were filed in Patricia's estate.)

On November 14, 1944, the court (Honorable Joseph W. Vickers) dismissed Hornaday's petition for the sale of stock and granted respondent's petition for removal of Hornaday as guardian of William. (He was also removed as guardian of Patricia.) Hornaday appealed from this order and also from a formal judgment filed on December 27, 1944.

On January 23, 1945, respondent filed, in the proceeding involving William's estate, a petition for the allowance of attorney's fees and expenses in the sum of $47,795.25, based on the performance of services in connection with the removal of Hornaday as guardian and the opposition to his petition for the sale of stock. (A similar petition was filed in the estate of Patricia.)

Thereafter, on February 28, 1945, Patricia filed a petition requesting the appointment of her attorney, Baldwin Robertson, as guardian ad litem of William for the purpose of opposing respondent's petition for the allowance of attorney's fees and expenses. Mr. Robertson was accordingly appointed on the same day. When the matter of allowance of fees came on for hearing before Judge Vickers, it appeared that there was pending in the same department a similar petition for the allowance of a like sum for services rendered by respondent's attorneys in procuring the removal of Hornaday as guardian for the sister Patricia. Judge Vickers concluded that the interests of the two minors were conflicting, and Mr. Robertson having resigned as guardian ad litem for William, Norman A. Bailie was appointed guardian ad litem in his place to attend all hearings on the fee application and to "prosecute an appeal from any adverse order or judgment thereon. * * *"

Following hearings on respondent's petition for allowance of counsel fees and expenses, at which Mr. Bailie represented William, Judge Vickers made an order on April 2, 1945, allowing $28,500 as attorney's fees and $376 as costs out of the estate of William. This order, which included within it an award of fees and settlement of account in the other guardianship (of Patricia, No. 216044), was entered in the minutes on April 16, 1945, and reads as follows:

"Having been heretofore submitted, the following is ordered: In the matter of the Petition of E. Mae McCallom, special guardian, for attorney fees and expenses. In Case 208,101 attorney fees, $27,500.00, Expenses: $376.00. In Case 216,044, Attorney fees $32,500.00, Expenses. $508.51.

"On the supplemental petition of E. Mae McCallom, special guardian, for attorney fees; Case 208,101: Attorney fees $1,000.-00, Case 216,044, Attorney fees $1,000.00.

"The first and final account of E. Mae McCallom special guardian, Case 216,044 is approved and allowed and attorney fees fixed at $32,500.00."

Thereafter, on May 4, 1945, counsel for respondent, upon the informal request of Mr. Bailie, as guardian ad litem of William, presented, and the judge signed and filed, a written order which covered the same subject matter (allowance of fees and costs) as the minute order, and which contained some findings and a provision for a lien.

On May 11, 1945, Mr. Bailie filed a petition for instructions "relative to appeal." At the hearing thereon, held May 28, 1945, he stated that the allowance of fees was too large, but testified that in his opinion an appeal would not be in the best interests of the ward's estate. The court (Honorable Newcomb Condee) thereupon ordered that no appeal be taken. On June 13, 1945, Patricia, William's sister, by her attorney, Mr. Robertson, petitioned for the appointment of a successor guardian ad litem to Mr. Bailie. This petition was denied on June 19, 1945, and the court refused to permit Mr. Bailie to resign.

On June 26, 1945, Patricia filed a notice of appeal from the written order of May 4, 1945, for and on behalf of her brother William. Thereafter, on July 2, 1945, and on petition therefor this court appointed Mr.

Crump as guardian ad litem to prosecute this appeal. On the same day (July 2, 1945), Mr. Crump filed a second notice of appeal on behalf of William from the said written order of May 4, 1945, and affirmed and approved the previous notice filed by Patricia on June 26.

So far as William's estate is concerned, the order appealed from herein related solely to the allowance of attorney's fees and costs. Neither the minute order entered April 16 nor the subsequent written order of May 4 contained any reference to the settlement of an account in his estate, and, so far as the record shows, no accounting was had in his estate.

Three questions have been argued and presented on the motion to dismiss: (1) Is an order awarding attorney's fees in a guardianship proceeding appealable? (2) If so, was the oral pronouncement of the court, entered in the minutes, such a final order? (3) If so, did the time to file notice of appeal run from the entry in the minutes, or from the filing of the subsequent written order?

[1] We have concluded that the first question must be answered in the negative, and since that is so, it becomes unnecessary to answer the other two.

Appealable orders in probate proceedings generally are listed in the Probate Code, section 1240, and include an order allowing an attorney's fee. Appealable orders in guardianship proceedings are separately covered by Probate Code, section 1630, and do not include such an order. Section 1630 repeats some of the orders listed in section 1240, and this has been taken as an indication of a legislative intention to make the guardianship section independent of the general probate section. In accordance with this view, several cases have held that section 1630 is exclusive in the field of guardianship, and that section 1240 cannot be invoked to make appealable, in guardianship proceedings, an order not listed in section 1630. See In re Guardianship of Reser, 57 Cal.App.2d 935, 936, 135 P.2d 709; In re Estate and Guardianship of Morro, 36 Cal.App.2d 623, 627, 98 P.2d 552. For similar holdings that Code Civ.Proc. § 963, subd. 3 [predecessor of Prob. Code §§ 1240, 1630], was exclusive, see In re Mailhebuau's Estate, 201 Cal. 664, 666, 258 P. 378; In re Wittmeier's Estate, 118 Cal. 255, 50 P. 393; Estate of Walkerly, 94 Cal. 352, 29 P. 719.

[2] Section 1630 of the Probate Code provides for an appeal from an order "settling an account of a guardian." It may be assumed that that language includes an annual, current or intermediate account, as well as a final account. See In re Grant's Estate, 131 Cal. 426, 429, 63 P. 731. It may also be assumed that if a minor elects to pursue his objections to an account and to the order of settlement by taking an appeal, and his interests adverse to his general guardian have been adequately protected as by the appointment of a guardian ad litem, the disposition of the appeal will be binding upon him. Cf. In re Di Carlo's Estate, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990; In re Vucinich's Estate, 3 Cal.2d 235, 44 P.2d 567; In re Eaton's Estate, 38 Cal. App.2d 180, 100 P.2d 813. But it does not follow that either order in this case is appealable. In stating what orders were appealable in guardianship matters, the Legislature undoubtedly contemplated that the allowance of attorney's fees be included in a guardian's account. It would necessarily follow that the question of the proper allowance of attorney's fees may be determined upon the settlement in the trial court of an account of the guardian and be reviewed on appeal from the order of settlement.

We conclude that the orders involved herein purporting merely to fix and allow attorney's fees in a guardianship matter, are nonappealable. It therefore becomes immaterial whether the oral pronouncement of the court was the final order, or whether the time for taking an appeal commenced to run from the minute order of April 2, 1945, or from the written order of May 4th. Neither was an order settling an account in the estate of William Ronald Leach.

The appeal is dismissed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER and SCHAUER, Justices (concurring in conclusion).

We concur in the conclusion reached in the majority opinion. As we understand said opinion it holds that neither the minute order nor the formal written order allowing attorneys' fees in this case is appealable, and therefore the attempted appeal therefrom must be dismissed. It does not purport to pass upon the validity of the order allowing attorneys' fees or give approval to any form of procedure in the trial court for the determination of the amount of attorneys' fees allowable in guardianship proceedings except on the settlement of an account of the guardian, and specifically holds that an order settling such an account, current or final, is appealable. With this understanding of the holding in the majority opinion, we are in full accord with it.

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29 Cal.2d 560

RICHFIELD OIL CORPORATION, a Corporation, Respondent, v. STATE BOARD OF EQUALIZATION, Appellant.

Sac. 5640.

Supreme Court of California, in Bank.

Jan. 23, 1947.

Conforming to mandate of the United States Supreme Court in 67 S.Ct. 156, which reversed 27 Cal.2d 150, 163 P.2d 1.

Prior opinion 155 P.2d 1.

Robert W. Kenny, Atty. Gen., and H. H. Linney and B. E. Kragen, Deputy Attys. Gen., for appellant.

Robert E. Paradise, Norman S. Sterry, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

PER CURIAM.

Pursuant to the mandate of the Supreme Court of the United States filed herein on the 13th day of January, 1947. It is hereby ordered that the judgment of this court filed and entered in the above-entitled action on the 1st day of November, 1945, reversing the judgment entered in the action by the Superior Court of the State of California, in and for the County of Sacramento, be and the same is hereby vacated and set aside and the remittitur of this court heretofore filed with the Clerk of said Superior Court upon reversal of the judgment is hereby recalled and annulled, and it is further ordered that the judgment of the Superior Court in favor of plaintiff Richfield Oil Corporation, and against defendant Board of Equalization be and the same is hereby affirmed, plaintiff and respondent herein to recover its costs on appeal. Let the remittitur issue forthwith.

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77 Cal.App.2d 713

COLLINS v. OWENS.

Civ. 13258.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1947.

1. Appeal and error 🔑102

An order sustaining a general demurrer, with leave to amend, to plaintiff's complaint was nonappealable.

2. False imprisonment 🔑20(1)
Malicious prosecution 🔑47

A complaint which alleged that plaintiff was arrested at "the instance and instigation" of defendant without any warrant of arrest, that defendant was not a peace officer, that plaintiff was orally informed that he was arrested because he was intoxicated, that he was not in a condition to warrant his arrest for intoxication, and that plaintiff's bail money was forfeited upon his failure to appear to answer a charge of misdemeanor under city ordinance, was sufficient, as against a general demurrer, to state a good cause of action for false imprisonment, although it did not state a cause of action for malicious prosecution.

3. False imprisonment ⚷20(1)

Where an arrest is made without legal process, all that need be alleged to charge an unlawful arrest is the arrest without process, the imprisonment and the damage.

4. Pleading ⚷204(2)

Where complaint alleged an unlawful arrest without process, imprisonment, and damage, other irrelevant matters also alleged in complaint would be disregarded as against a general demurrer.

5. False imprisonment ⚷20(2)

Even if allegations in complaint that two days after his arrest plaintiff was charged under city ordinance, that he had posted bail, and that he did not appear on the charge and forfeited his bail amounted to an allegation that plaintiff had pleaded guilty to charge, allegations would not constitute a defense or justification as a matter of law, to charge of false arrest.

6. False imprisonment ⚷7(5)

Although a verdict of guilty is admissible on trial on basic issue of justification for the arrest or on the issue of damages, it is not conclusive where arrest is without a warrant.

7. False imprisonment ⚷7(3)

The only fact justifying an arrest for a misdemeanor without a warrant either by a police officer or an individual is that the person arrested in fact committed the offense in his presence. Pen.Code, § 836.

8. False imprisonment ⚷20(1)

Where arrest forming basis of false imprisonment charge is without a warrant, plaintiff need not allege that his arrest was unlawful. Pen.Code, § 836.

9. False imprisonment ⚷20(1)

Fact that complaint alleged that defendant did not directly make the arrest of plaintiff without a warrant on a charge of intoxication, but that such arrest was made by an officer at "the instance and instigation" or "direction" of defendant, did not relieve defendant from responsibility if arrest was unlawful. Pen.Code, § 836.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Charles B. Collins against J. P. Owens. From an order sustaining a general demurrer, with leave to amend, to plaintiff's complaint and a judgment of dismissal upon plaintiff's failure to amend, the plaintiff appeals.

Appeal from order sustaining demurrer dismissed, and judgment appealed from reversed.

Charles B. Collins, of Berkeley, in pro. per.

Morse & Richards, of Oakland, for respondent.

PETERS, Presiding Justice.

[1] The trial court sustained a general demurrer, with leave to amend, to plaintiff's complaint. Upon plaintiff's failure to amend, judgment of dismissal was entered against him. From that judgment and from the order sustaining the demurrer plaintiff appeals. The order is non-appealable, and the appeal therefrom is dismissed.

The complaint alleges that on February 22, 1945, at "the instance and instigation" of defendant, plaintiff was arrested at his place of business in Berkeley; that he was taken to the Hall of Justice in Berkeley and orally informed that he was arrested because he was intoxicated; that he protested his arrest and urged that he was not intoxicated; that in fact plaintiff was not drunk nor in a condition to warrant his arrest for intoxication; that his protests were overruled and he was incarcerated in the "drunk" cell; that on the afternoon of the next day plaintiff furnished bail and was released; that "on the following day a charge of misdemeanor was laid under the city ordinance"; that "plaintiff did not appear thereon and his bail money was thereupon forfeited"; that "defendant is not a peace officer, and the arrest was made at his direction and instigation without any warrant of arrest." The balance of the allegations relate to damages, both actual and punitive.

To this complaint defendant generally demurred. It is admitted that defendant interpreted the complaint as one for malicious prosecution and correctly argued that the complaint did not plead such a cause of action in that it fails to plead the determination of the criminal prosecution in favor of plaintiff, and fails to allege want of probable cause, both allegations being indispensable to a malicious prosecution action. See cases collected 16 Cal.Jur., p. 744, § 13. It was undoubtedly on this theory that the demurrer was sustained.

[2-4] On this appeal plaintiff argues, and the same contention was made in the lower court, that, although the complaint does not state a cause of action for malicious prosecution, it does state, as against a general demurrer, a good cause of action for false imprisonment. Plaintiff's contention is sound. When an arrest is made without legal process all that need be alleged to charge an unlawful arrest is the arrest without process, the imprisonment and the damage. These allegations appear in this pleading. Other irrelevant matters are also alleged, but, as against a general demurrer, they must be disregarded.

There are many cases discussing the elements of a cause of action for false imprisonment, and distinguishing between that action and one for malicious prosecution. In the early case of Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381, a case that has frequently been cited with approval, it was specifically held in a false imprisonment case that it is not necessary to allege malice or lack of probable cause, and that if any justification for the arrest exists it must be pleaded by the defendant as a defense. In Neves v. Costa, 5 Cal.App. 111, 89 P. 861, the court first distinguished between the two actions, and then held that it is not necessary in a false imprisonment case, as it is in a malicious prosecution action, to allege a determination of the criminal prosecution favorable to plaintiff. At p. 117 of 5 Cal. App., at page 863 of 89 P., the following appears:

"The provocation, motive, and good faith of the defendant in an action for false imprisonment constitute no material element in the case, and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the action for malicious prosecution. Without allegation and proof of both, the action will fail. [Citing an authority.]

"No one can recover damages for a legal arrest and conviction. Therefore, in cases of malicious prosecution, it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest, and no matter ex post facto can legalize an act which was illegal at the time it was done. From this it will be seen that one of the essential elements of a complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of the plaintiff, while it is equally apparent that this is not a necessary or proper allegation in an action for false imprisonment. [Citing two authorities.]" This holding is in accord with the overwhelming weight of authority. See annotation, 25 A.L.R. 1518.

In Monk v. Ehret, 192 Cal. 186, 219 P. 452, another leading case, the complaint was substantially similar to the one here under discussion, and, as in the instant case, alleged the reason for plaintiff's arrest. In holding that the complaint there involved stated a good cause of action, the court stated (192 Cal. at page 189, 219 P. at page 453):

"We are satisfied that the complaint states a cause of action for false imprisonment. It is not necessary to allege that the imprisonment was unlawful. [Citing five authorities.] * * *.

"All of the elements essential to constitute a cause of action for false imprisonment are to be found in the complaint; segmentally appearing, it is true, but nevertheless existing. The elements essential to constitute a cause of action for malicious prosecution are absent, to wit, an allegation of a want of probable cause for instituting the prosecution and an allegation that the proceedings terminated favorably to plaintiff. These elements are essential to an action for malicious prosecution. [Citing an authority.] While it is true that the complaint contains allegations not necessary to a statement of a case of false imprisonment, and confessedly takes on the color of allegations usually found in actions for malicious prosecution, it is apparent upon its face that it was the purpose of the pleader acting in good faith to state a case of false imprisonment, and whatever of surplusage allegations there are to be found not necessary to a statement of said cause of action are to be disregarded. This is a general rule of pleading."

[5] The defendant does not challenge these rules but contends that, while normally all that need be alleged is the arrest and damage, in the present case plaintiff has pleaded facts which, as a matter of law, constitute a justification for the arrest or which require plaintiff to negative justification on the part of defendant. In this connection the allegations that two days after his arrest plaintiff was charged under the city ordinance, presumably with intoxication, that he had posted bail and that he did not appear on the charge and forfeited his bail, are referred to. Even if these facts amounted to an allegation that plaintiff had pleaded guilty to an intoxication charge, they would not constitute a defense or justification, as a matter of law, to the charge of false arrest.

[6] Although the cases are in conflict, the great weight of authority is to the effect that while a plea or verdict of guilty is admissible on the trial on the basic issue of justification for the arrest or on the issue of damages, it is not conclusive, at least where the arrest is without a warrant. Larson v. Feeney, 196 Mich. 1, 162 N.W. 275, L.R.A.1917D, 694; McCullough v. Greenfield, 133 Mich. 463, 95 N.W. 532, 62 L.R.A. 906, 1 Ann.Cas. 924; Spain v. Oregon-Washington R. & Nav. Co., 78 Or. 355, 153 P. 470, Ann.Cas.1917E, 1104; Palmer v. Maine Cent. R. Co., 92 Me. 399, 42 A. 800, 44 L.R.A. 673, 69 Am.St.Rep. 513; Oleson v. Pincock, 68 Utah 507, 251 P. 23; Texas & P. R. Co. v. Parker, 29 Tex.Civ.App. 264, 68 S.W. 831; Gold v. Campbell, 54 Tex.Civ.App. 269, 117 S.W. 463; Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242, 40 A.L.R. 54; contra, Erie R. Co. v. Reigherd, 6 Cir., 166 F. 247, 20 L.R.A.,N.S., 295, 16 Ann.Cas. 459; Louisville Ry. Co. v. Hutti, 141 Ky. 511, 133 S.W. 200, 33 L.R.A., N.S., 867; Holder v. St. Louis & S. F. R. Co., 155 Mo.App. 664, 135 S.W. 507; Williams v. Brooks, 95 Wash. 410, 163 P. 925; notes 20 L.R.A.,N.S., 295; 16 Ann.Cas. 461; 1 Ann.Cas. 926. The reason for the rule is obvious. A person may be guilty of an offense and may plead guilty thereto, but the arrest without a warrant may still be illegal.

[7] But, says defendant, under the facts pleaded the arrest was made for intoxication which must have been in the presence of the defendant and the arresting officer, and plaintiff has failed to plead lack of reasonable grounds for making such arrest. Defendant concludes that lack of such allegation is fatal. The defendant's arguments misconceive the powers of an individual or police officer to arrest for a misdemeanor without a warrant. It is undoubtedly the law that neither a police officer nor an individual has the right without a warrant to arrest for a misdemeanor not committed in his presence. It is no justification, as it is in the case of a felony (Penal Code, § 836), to prove reasonable grounds to believe that the offense has been committed—the only fact justifying such an arrest is that the person arrested in fact committed the offense in their presence. See collection of cases 3 Cal.Jur. p. 117, § 4.

[8] Defendant's argument really amounts to the contention that it is necessary for a plaintiff in a false imprisonment case to allege that his arrest was unlawful. This may be the rule where the arrest is made pursuant to process, but it is not the law as applied to cases where the arrest is without a warrant. This point was discussed in Peters v. Bigelow, 137 Cal.App. 135, at page 138, 30 P.2d 450, at page 451, as follows: "An examination of the authorities will reveal that, in those cases where it was held that a necessary allegation in the complaint was one setting forth that the imprisonment was unlawful, the arrest was made pursuant to process, allegedly invalid. On the other hand, in those cases * * * where it was held that a mere allegation of imprisonment was sufficient, the arrest was made without process. The rule would seem to be that, where without process an arrest is made, it is not necessary to allege that such arrest was unlawful; while, if process was employed, the facts constituting the invalidity thereof must be set forth. In other

words, if the act complained of is one, the mere stating of which constitutes a trespass, it is manifestly illegal."

[9] The fact that the complaint alleges that the defendant did not directly make the arrest but that such arrest was made by an officer at "the instance and instigation" or "direction" of defendant does not relieve defendant from legal responsibility if such arrest was unlawful. The defendant concedes that this is the law. Such concession is in accordance with the rule adopted in this state. See cases collected 12 Cal.Jur., p. 434, § 6.

The appeal from the order sustaining the demurrer is dismissed. The judgment appealed from is reversed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

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77 Cal.App.2d 704

TRUMBO v. BANK OF BERKELEY et al.

Civ. 13188.

District Court of Appeal, First District,

Division 1, California.

Jan. 20, 1947.

1. Appeal and error 🔑1008(1)

In action to recover for work, labor, and services, conflicts in the evidence regarding existence of agreement and regarding value of plaintiff's work were for the trial court.

2. Contracts 🔑121

A contract by director or shareholder of an existing corporation that a designated person will be put or maintained in office, or by which, in any other way, a director attempts to contract away his discretionary vote on the board of directors, is violative of public policy and is void.

3. Work and labor 🔑10

The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute, but, if the services rendered under a void contract by one party thereto were not intrinsically illegal and the other party fails voluntarily to perform on his part, the former may recover as upon a quantum meruit for what the latter actually received in value, though no recovery can be had upon the contract.

4. Corporations 🔑30(5)

In action to recover from promoters and directors of bank the reasonable value of services rendered at instance of such promoters and directors of the bank prior to its incorporation, evidence established that services were not intended to be gratuitous.

5. Work and labor 🔑10

One who rendered lawful services to promoters and prospective directors of bank prior to its incorporation was entitled to recover from them the reasonable value of his services even though he could not recover damages from them for alleged breach of oral contract to employ him for life as vice president at a stipulated salary, because of the illegality of such a contract.

6. Corporations 🔑30(5)

In action to recover from promoters and directors of bank the reasonable value of services rendered at instance of such promoters and directors of the bank prior to its incorporation, evidence supported implied finding that services rendered were of material, substantial benefit to the promoters.

7. Corporations 🔑30(5)

In action to recover from promoters and directors of bank the reasonable value of services rendered at instance of such promoters and directors of the bank prior to its incorporation, evidence sustained recovery in the amount of $5,000.

8. Corporations 🔑30(5)

In action to recover from promoters and directors of bank the reasonable value of services rendered at instance of such promoters and directors of the bank prior to its incorporation, judge and jury were qualified, without the aid of expert testimony, to fix the value of the services which included interviewing the superintendent of banks, investigation of bank sites, and procurement of equipment.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by H. E. Trumbo against the Bank of Berkeley and others to recover damages on two causes of action for breach of a contract of employment. Plaintiff dismissed as to the Fidelity Acceptance Corporation. A nonsuit on both causes of action was granted to the Bank of Berkeley and to the Fidelity Acceptance & Thrift Company, and to all defendants on the second cause of action. Judgment in favor of plaintiff on the first cause of action against Lester W. Hink and others, individual defendants, and Lester W. Hink and the others appeal.

Affirmed.

Clark, Nichols & Morton, of Berkeley, for appellants.

Vincent W. Hallinan, James Martin MacInnis and Ray M. Greene, all of San Francisco, for respondents.

PETERS, Presiding Justice.

This action was instituted by plaintiff against the corporate and the individual defendants to recover damages for breach of a contract of employment. The complaint alleged two causes of action. The first was in the form of a common count for work, labor and services alleged to have been performed by plaintiff at the special instance and request of defendants, which services, it is alleged, were reasonably worth $5,000. The second cause of action alleges that the parties entered into an oral contract in February, 1944, whereby in consideration of certain services to be rendered and which were rendered by plaintiff, the defendants agreed to employ the plaintiff, upon the incorporation of the defendant Bank of Berkeley, as vice-president for life at a minimum salary of $300 per month; that defendants refused to perform; that plaintiff is willing to perform; that as a result plaintiff has been damaged in the sum of $21,000. The defendants denied all the material allegations of the complaint. The cause was tried before a jury. During the course of the trial the plaintiff dismissed as to the Fidelity Acceptance Corporation. A nonsuit on both causes of action was granted to the Fidelity Acceptance and Thrift Company and the Bank of Berkeley, and to all defendants on the second cause of action. After these rulings the trial proceeded, limited to the common count against the five individual defendants. The jury brought in a verdict of $5,000, and, from the judgment entered on the verdict, the five individual defendants appeal.

The evidence most favorable to respondent shows that he has had many years of banking and financial experience; that as early as 1906 he worked for the Farmers and Merchants Bank of Oakland, starting as a runner and finally becoming assistant treasurer, doing primarily accounting work; that in 1910 and 1911, and again in 1919 and 1920, he worked for the Mission Savings Bank as bookkeeper, treasurer, appraiser and loan officer; that during 1922 through 1924 he was employed by the American Trust Company to procure for that bank suitable locations for some 28 branch banks; that he did personnel work for these banks and took some six or eight banking courses from the American Banking Association; that since then he has been connected with the real estate and related businesses; that as early as 1934 he became interested in Berkeley as a likely location for an independent bank; that he gave the project up then because of the depression; that in January, 1944, his interest was again revived in the project; that he talked the matter over with the superintendent of banks who told him that such a project, properly worked out, would be looked upon with approval by his office; that he discovered that the five appellants, all of whom are directors in the two Fidelity companies and are prominent Berkeley citizens, had, some time in the past, been interested in organizing a Berkeley bank but had failed to complete the plan; that in January, 1944, he visited the appellant Hink; that he told Hink that he was familiar with his past efforts and inquired if he was still interested in organizing an independent bank in Berkeley; that Hink told him that he was still very much interested in such a proposal; that he outlined to Hink his ideas of the project; that Hink told him that he was connected with the two Fidelity companies and that those companies were interested in such a project, and suggested that respondent discuss the matter with appellant Hittell, who was general manager of the two Fidelity corporations; that he then met with Hittell; that he talked with Hittell at length and explained to him, in detail, his ideas on the subject; that Hittell evidenced great interest and stated that he would discuss the matter with Hink; that he continued to work out details of the project and discussed them with Hittell and others; that in February, 1944, he was summoned to a meeting with the five appellants; that at this meeting the project was discussed at length; that the appellants expressed the desire that he should go ahead with the project, and particularly requested him to keep in touch with the superintendent of banks to see to it that a permit was secured; that then the subject of his employment was discussed and appellant Clark suggested that the group raise $500 to pay to respondent to carry him over a short while until the bank got under way; that he agreed to this suggestion, but later the group determined that they needed this money to organize the bank; that the appellants then asked him what he expected for his efforts and he replied that he was willing to accept a vice-presidency at $300 a month with an increase of $50 per year, and an increase over that if the directors felt so inclined; that the appellants agreed to this proposal; that he related to appellants his experience in the banking field and that they stated that none of them had had any banking experience and they expressed the need for his guidance; that he told the appellants that he expected to make this his lifetime work; that the $500 offer which he accepted, and which was later withdrawn and never paid, was intended as compensation for his services in addition to his employment by the bank; that it was his understanding that appellants were to become directors of the new bank. It should be here mentioned that when the new bank was incorporated on December 4, 1944, the five appellants became five of the nine directors, and Hittell became the president. The respondent then recounted at length what he did to assist in the organization of the bank. He testified that from January, 1944, to December of that year he devoted practically full time to the enterprise; that he interviewed the superintendent of banks on many occasions; that he secured information for the superintendent of banks required before a permit would be granted; that he discussed with the superintendent the procedure to be followed; that he discussed all details with all appellants on many occasions; that he secured copies of the Bank Act and went over the statute with Clark; that at Clark's suggestion he prepared a detailed plan of operation for the bank; that he made a detailed study of traffic problems in Berkeley in order to locate a proper site for the new bank; that he looked over and investigated eight different sites; that he went over these proposed sites in detail with Hittell; that he made sketches of a proposed layout for the bank; that he investigated the ownership of some of the proposed sites and discussed purchase with the owners; that with one owner he had twenty-five to thirty conferences and got him to come down materially in his price; that all during this time appellants reassured him that he would secure employment in the bank when it was organized; that he discussed prospective purchasers of stock and advertising being used to secure investors; that he located second-hand banking equipment; that on December 1, 1944, the appellants put one Harrison on the payroll and told respondent to work with him; and he then began to realize that he was being pushed aside; that he then visited all of the appellants individually and demanded to know if he was going to get the promised job; that he was referred back to Hittell; that he got no satisfaction from Hittell; that he again visited Hink and Hink offered him $1,000 in full settlement of his claims, which he refused; that Hink told him that was the best that could be done for him and again referred him to Hittell; that Hittell told him that there was no room in the bank for him, and referred him to attorney Clark; that Clark refused to do anything about the matter;

that then, on December 12, 1944, he wrote to each of the appellants demanding either that they give him the promised job or the sum of $5,000 for his services. Clark, by letter, denied any liability to him by the bank or appellants.

[1] The evidence of appellants directly contradicts much of this testimony. They testified that no agreement was ever made, and that it was simply understood that respondent was to go along on the deal, and that if, after the bank was formed, he was satisfactory to the directors, and if a place could be found for him, he might secure employment from the bank. The appellants sought to minimize the value of the work done by respondent and testified that nothing respondent did was of any material value to them. These conflicts were for the trial court and will not further be considered on this appeal.

The main contention of appellants is that the contract of employment set forth in the second cause of action was illegal. It is urged that the parties were in pari delicto, and that for that reason respondent cannot recover directly or indirectly on the contract; that no recovery will be allowed on the common count; that a contract such as this to employ respondent for life as a vice-president is necessarily illegal because to carry out such a contract appellants would have to control the majority of the stock or the board of directors; that in any event any contract that would impair their untrammeled discretion in selecting proper employees or officers is illegal; that a contract that would either subject them to a damage suit or compel them to select respondent for the position in question violates fundamental rules of public policy.

[2, 3] There can be no doubt that a contract by a director or shareholder, at least of an existing corporation, whereby it is agreed that a designated person will be put or maintained in office, or by which, in any other way, a director attempts to contract away his discretionary vote on the board of directors, is violative of public policy and is void. See Seitz v. Michel, 148 Minn. 80, 181 N.W. 102, 12 A.L.R. 1060; Van Slyke v. Andrews, 146 Minn. 316, 178 N.W. 959, 12 A.L.R. 1068; Hellier v. Achorn, 255 Mass. 273, 151 N.E. 305, 45 A.L.R. 788; West v. Camden, 135 U.S. 507, 10 S.Ct. 838, 34 L.Ed. 254; see annotations 12 A.L.R. 1070; 45 A.L.R. 795. There are, however, many cases that hold that contracts of promoters relating to future employment by the proposed new corporation are not void, but may either be ratified by the new corporation or enforced against the promoters. See discussion and collection of cases 1 Fletcher, Cyc. Corp. (Perm. ed.), p. 691, § 208; ibid. p. 700, § 211; ibid. p. 601, § 191; Puller v. Royal Casualty Co., 271 Mo. 369, 196 S.W. 755; Mansfield v. Lang, 293 Mass. 386, 200 N.E. 110. It might well be argued that, under this last cited rule, the contract pleaded against the appellants in the second cause of action was not illegal. But such discussion would only be of academic interest because, in the instant case, recovery was not had for breach of the contract to employ as vice-president, which, for the purposes of this opinion, we may assume was illegal or void, but for failure to pay the reasonable value of services actually rendered to the promoters at their request. Appellants contend that when an illegal contract is relied upon, regardless of the form of the action in which it is presented, the court will not enforce it, but, under the doctrine of in pari delicto, will leave the parties where it finds them. Such cases as Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36, and Haruko Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345, and other similar cases are cited in support of this rule. Those cases all deal with services rendered where the acts relied upon to constitute performance were at least in part illegal. In such a situation recovery will not be permitted either on an express or implied contract. But that is not the situation here. In this case respondent was not allowed to recover for breach of the oral contract to employ, but for the reasonable value of the services rendered to the promoters prior to incorporation. There was nothing illegal or against public policy in the nature of those services. While the major consideration expected by respondent was a position in the bank, it would be most unjust and in-

equitable to allow the promoters to take the benefits of respondent's efforts, all of which were legal, and then to be allowed to escape all liability on the ground that the consideration they agreed to furnish was illegal. The proper rule, amply supported by authority, is thus stated in 27 Cal.Jur. p. 210, § 17: "The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute. But if the services rendered under a void contract by one party thereto were not intrinsically illegal and the other party fails voluntarily to perform on his part, the former may recover as upon a quantum meruit for what the latter actually received in value, though no recovery can be had upon the contract."

Thus in Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 P. 1011, the plaintiff was allowed to recover for the reasonable value of his lawful services, although the written contract to construct water gas apparatus between the president of the defendant company on behalf of the corporation on one side and the president as an individual and another on the other was invalid, and against public policy. In that case, as in this, the plaintiff sued upon the written contract and upon a quantum meruit. After holding that the written contract was void as against public policy the court held that: "The plaintiff could not recover on the written contract, but he might recover, as upon a quantum meruit, for what the defendant actually received in value." (At page 660 of 131 Cal., at page 1013 of 63 P.)

Another case directly in point is Wiley v. Silsbee, 1 Cal.App.2d 520, 36 P.2d 854. In that case an attorney entered into a written contract to render professional services to a wife in a divorce action, she agreeing to pay him a percentage of whatever was recovered from her husband on a property settlement. After the services had been rendered the wife refused to pay and the attorney brought suit stating three causes of action, one of which was on a quantum meruit. The court first held that the written contract was void as against public policy but held that, nevertheless, the plaintiff could recover for the reasonable value of his services. At page 522 of 1 Cal.App.2d., at page 854 of 36 P.2d, it is stated:

"It is likewise now established as a proposition of substantive law, that in a case of a contract to pay for services which is void as against public policy, there arises an implied contract to pay for services rendered thereunder, and the remedy of action sounding in quantum meruit is available to recover the reasonable value thereof. In Ayres v. Lipshutz, [68 Cal.App. 134, 228 P. 720], on hearing by the Supreme Court, it was stated: 'The contract being void as against public policy afforded no basis for a recovery which could have been had only upon a quantum meruit.' In Theisen v. Keough, [115 Cal.App. 353, 1 P.2d 1015], plaintiff sued on a contract very similar to the one here involved in one cause of action, and joined therewith a second cause on quantum meruit. The trial court adjudged the contract void as against public policy, and to the quantum meruit cause found that plaintiff had been fully paid. On appeal, the court, after quoting from the case of Ayres v. Lipschutz, supra, the same paragraph as hereinabove quoted, said: 'We therefore, find the parties with no agreement or contract regulating the compensation to be paid; the attorney proceeding with the cause under the implied contract that he will be compensated in a reasonable amount for services performed.'" See, also, Kyne v. Kyne, 74 Cal.App.2d 563, 169 P.2d 272; Woods v. Watson, 46 Cal.App.2d 399, 115 P.2d 863.

[4, 5] The contention of appellants that no recovery can be had on the quantum meruit because the evidence shows that the pre-incorporation services were intended to be rendered without compensation is not sound. The evidence of the offer of $500 made at the first meeting of the parties, and the offer of appellant Hink to pay $1,000 in settlement for the services rendered, demonstrates that no one concerned believed the services were to be gratuitous. Of course the respondent rendered the services in the hope of securing the vice-presidency offered to him, but that very fact also demonstrates that the services

were not to be gratuitous. His services being lawful, even though the respondent could not compel appellants to pay the promised consideration, he can recover for the reasonable value of such services.

[6-8] The last main contention of appellants is that the evidence does not support the judgment as to the amount of damages. In this connection appellants rely mainly on their own evidence to the effect that all that respondent did was to do a lot of running around seeking locations, and doing other things, and that these services were of no value to them. The evidence and the reasonable inferences therefrom produced by respondent supports the implied finding of the jury that the services rendered were of material, substantial benefit to appellants. But, say appellants, even if this is so, there was no expert evidence introduced by respondent from which the jury could fix the reasonable value of the services. It is urged that while the trier of the fact may fix the reasonable value of services without opinion evidence where the issue involves the value of something where such value is a matter of common knowledge, expert testimony is necessary where the problem involves the value of services of a nature where such value is not a matter of common knowledge. Ferrari v. Mambretti, 58 Cal.App.2d 318, 136 P.2d 326. The services here involved have already been summarized. They were not of a technical nature. They were of a type that their value could be appraised by any reasonably intelligent layman. That this is so is illustrated by the case of Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 137 P.2d 36. In that case the plaintiff sued for the reasonable value of services rendered to defendants in promoting an ice rink. The services rendered included arranging for credit for the project with various firms; furnishing an office as a headquarters; handling, on occasion, the numerous details involved in supervising the construction of the rink; the securing of employees for the new project; securing publicity; and dealing with creditors who were pressing defendants for payment. It was there held that the trier of fact was competent to fix the reasonable value of the services from the evidence of their nature and extent. At page 488 of 58 Cal.App.2d, at page 40 of 137 P.2d, this court stated: "Before considering to what extent the individual defendants as well as the corporation Ice Bowl, Inc., are liable to plaintiff, the contention that there is no evidence of the value of his services may be disposed of. Defendants object that no witness testified as to that value. We are of the view that this is a situation where it was competent for the trial judge to determine the worth of the services from the testimony as to their nature and extent. Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374; Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917. There are types of technical service with which a judge or jury may be too unfamiliar to make a determination without expert testimony, but the services here are not of that kind."

In the instant case the jury has fixed the reasonable value at $5,000. The trial judge did not reduce the judgment in passing on the motion for a new trial. We cannot say, as a matter of law, that these determinations were unreasonable. Certainly if the trier of the fact was qualified to fix the value of the services without opinion evidence in the Mabrey case, the judge and jury in the instant case were equally qualified to fix the value of the services here involved.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

PEOPLE v. WEATHERFORD. *

Cr. 4073.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1947.

Rehearing Granted Jan. 23, 1947.

1. Criminal law ⚷761(12), 1172(3)

Instructing jury on felonious intent in terms which assumed that defendant killed deceased was reversible error, where defendant specifically denied participation in homicide, evidence was entirely circumstantial and only evidence identifying defendant as a participant was given by an admitted perjurer.

2. Criminal law ⚷404(4)

A hammer was inadmissible in evidence in prosecution for first-degree murder in absence of evidence that it was used in connection with murder.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Jackson M. Weatherford was convicted of murder in the first degree and from the judgment and an order denying a new trial, he appeals.

Judgment and order reversed and cause remanded for a new trial.

See also 27 Cal.2d 401, 164 P.2d 753.

Ben Van Tress and James R. Jaffray, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., Jere J. Sullivan, Robert Wheeler and J. Miller Leavy, Deputies Dist. Atty., all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment following a verdict of guilty of murder in the first degree, with a recommendation that the defendant be placed in the state prison for life, after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

The evidence which is entirely circumstantial, indicates that the deceased, Mrs. Struck, placed a "lonely lady" advertisement[1] in the personal column of the Los Angeles Times, which notification appeared several times during the months of October and November, 1942, and in the early part of 1943. Defendant answered one of the advertisements; however, he claimed that he did not meet her as a result of the notice but met her at a restaurant which she operated.

In December, 1942, or the first part of January, 1943, defendant leased a restaurant building which he owned, known as "Oh Johnnie's Cafe", to Mrs. Struck for the term of five years, her to pay him as rental 5% of the gross profits. The relationship between defendant and his tenant was not a satisfactory one and it was mutually agreed that she should surrender the premise on March 25, 1943; however, Mrs. Struck had foodstuff in the cafe and it was decided that she could stay for a short time thereafter. On March 22, or 23, 1943, defendant served Mrs. Struck with an eviction notice. Frequently during the period of Mrs. Struck's tenancy defendant complained to neighbors that he wished he could get her out of his restaurant; that she was one of the dirtiest and filthiest women he had ever known.

Mrs. Hayden testified that she saw decedent on Saturday, April 3, 1943, at about 1:00 p. m. and that Mrs. Struck was in a hurry to leave the restaurant in order to go downtown. She did not see decedent alive thereafter, but later in the afternoon of April 3, 1943, when she passed by "Oh Johnnie's Cafe she saw on the door a sign which read, "Back later".

At 9:35 a. m. on Sunday, April 18, 1943, defendant telephoned the Los Angeles Police Department and said that he had found the dead body of Mrs. Struck in his cafe. At about 10:00 a. m. police officers arrived at the cafe where they found the corpse. It was badly decomposed with the head badly crushed. There was a hole in the skull which, in the autopsy surgeon's opinion, was caused by the round part of a hammer that is used to drive a nail. There was a hammer on a shelf in the kitchen; however, the hammer was clean without any blood or hair upon it and failed on examination to reveal any fingerprints.

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[1] This is an example of the advertisement:

"Lone lady of means meet refined business man, fifty to sixty, Box-Y-10—Times."

* Subsequent opinion 178 P.2d 816.

The only testimony tending to establish the identity of defendant as the murderer was that of Paul Farmer. At the time of the murder he was 15 years old and at the date of the present trial he was 18 years of age. He testified at *this trial* that on April 5, 1943, after covering his newspaper route he returned home at about 7:30 p. m.; that he had known and seen the defendant for two or three years and also knew Mrs. Struck by sight; that at about 7:35 p. m., while sitting by an open window in his bedroom listening to the radio, he heard unusual sounds coming from Oh Johnnie's Cafe; that the sounds were of "two people cussing each other", and without looking out the window he listened for about a minute and had no trouble at all in hearing voices and in distinguishing Mrs. Struck's voice and a man's voice. Drawing back the curtain, he looked out the window and into the rear window of Oh Johnnie's Cafe storeroom which was about 20 or 25 feet distant. Through this window he could see into the cafe's dining room. Defendant was standing directly in front of Mrs. Struck, facing her and about a foot from her with his back toward the witness. The witness testified that he recognized the voice of the man as the voice of defendant; that defendant was visible from the back of his neck down to his knees. He heard the decedent in a loud voice cry, "No, no", raising and moving her hands away from her body with the palms out. Defendant was not seen to change his position or strike Mrs. Struck. After a few minutes the witness pulled the curtain back on the window so that he could not see across into the storeroom and returned to listening to the radio. After two or three minutes he heard the loud cry of a woman coming from the cafe. He thereupon turned out all the lights in his house, pulled the curtain back, and for about five or ten minutes looked in the storeroom window. Though the lights were still on in the cafe he could not see anyone since the storeroom window was covered by something which obstructed his vision. After about five minutes the lights went out in the cafe and after watching a few minutes and not seeing anyone leave he became frightened, turned on all the lights in his house and went to bed.

This witness, who at the time he testified was on probation after conviction of a criminal offense, had testified before the grand jury in November, 1943, that in looking out of his window on April 5, 1943, into Oh Johnnie's Cafe he had seen only part of an arm of a man and that the man's voice he had heard was not that of defendant. He gave similar testimony at a prior trial[2] of the present case in January, 1944. December 15, 1943, he stated to Mr. Hyde and Mr. Mason that defendant was not the man whose voice he had heard on the evening of April 5, 1943. In March, 1945, and in March, 1946, he made a similar statement to Mrs. Elsie Weatherford.

Defendant took the witness stand in his own behalf and testified that he did not strike the decedent.

Defendant relies for reversal of the judgment, among others, on the proposition that *the trial court committed prejudicial error in instructing the jury as follows:*

> *"In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.*
>
> *"The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent."*

This proposition is tenable. The same identical language was condemned by the

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[2] For proceedings on a previous appeal see People v. Weatherford, 27 Cal.2d 401, 409, 164 P.2d 753.

Supreme Court in People v. Peterson, 29 Cal.2d 69, 173 P.2d 11, the court speaking through Mr. Justice Schauer saying at page 71 of 29 Cal.2d, at page 16 of 173 P.2d, "* * * That the instruction * * * should not be given in a case such as this, where defendant does not concede participation in the transaction."

The erroneous instruction did not cause a reversal of the judgment in the Peterson case for the reason, as stated by the court, that the case was not "A close one and no miscarriage of justice is shown as result of the giving of the instruction."

[1] In the instant case defendant specifically denied participation in the crime and it cannot be questioned that such erroneous instruction was prejudicial in view of the fact that the evidence is entirely circumstantial and the only evidence identifying defendant as a participant in the crime was given by the witness Farmer, an admitted perjurer.

For the foregoing reasons the judgment and order must be reversed.

Request of Attorney General for Review of Ruling of the Trial Court

The attorney general has requested this court pursuant to the provisions of section 1252[3] of the Penal Code to pass upon a ruling of the trial court on the exclusion of evidence.

Defendant was called to the witness stand in his own defense and testified as follows:

"By Mr. Van Tress:

"Q. Did you ever strike a woman by the name of Mary A. or known as M. A. Struck? A. No, sir.

"Mr. Van Tress: You may cross examine."

[2] On cross-examination the district attorney offered in evidence a hammer marked Exhibit 8 to which defendant objected and the objection was sustained. The court's ruling was correct. The record is devoid of any evidence which would indicate that the exhibit was used in connection with the murder.

The judgment and order are and each is reversed and the cause is remanded for a new trial.

MOORE, P. J., and WILSON, J., concur.

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77 Cal.App.2d 764

PEOPLE v. LEITGEB.

Cr. 4044.

District Court of Appeal, Second District, Division 3, California.

Jan. 22, 1947.

1. Criminal law 🔑1144(13)

On appeal by motorist from order denying new trial and from judgment of conviction, District Court of Appeal was obliged to view the testimony of the people's witnesses as if given full credit by the jury.

2. Criminal law 🔑1159(2)

On appeal from order denying new trial and judgment of conviction of motorist for unlawfully killing a pedestrian with an automobile driven with gross negligence, District Court of Appeals could interfere with finding of jury only if convinced that freedom from gross negligence was so clearly established by the evidence that reasonable minds could not differ on the question. Pen.Code, § 192, subd. 3(a).

3. Automobiles 🔑355(13)

Evidence sustained conviction of motorist for unlawful killing of pedestrian by means of an automobile driven with gross negligence, where, according to people's evidence, motorist drove 40 miles an hour into a safety zone. Pen.Code, § 192, subd. 3(a).

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[3] Section 1252 of the Penal Code reads in part thus:

"On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the state which it may be requested to pass upon by the attorney general."

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Ernest Leitgeb was convicted of the unlawful killing of another by means of a vehicle being driven with gross negligence, and he appeals.

Judgment of conviction and order denying new trial affirmed.

Gold & Needleman and Robert Kingsley, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Laughlin E. Waters, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Appellant, Ernest Leitgeb, was convicted in a jury trial of the unlawful killing of one Eugene Kasmer by means of a vehicle being driven with gross negligence. He appeals from the judgment and an order denying his motion for new trial. Defendant was prosecuted under section 192, subdivision 3(a) of the Penal Code. The sole issue of fact was whether he was grossly negligent in the operation of his car.

In appellant's opening brief the case is summarized as follows: "According to defendant and his witnesses, defendant was driving west, on Sunset, on the street car tracks (the center traffic lane of the street), at about 25 miles per hour, when the decedent, crossing the street from south to north, suddenly appeared out of the darkness in front of the car. Defendant and his witnesses testified that defendant immediately applied his brakes, but was unable to avoid the accident. The prosecution's witnesses testified that defendant, driving about 40 miles per hour, in the lane immediately north of the car tracks (lane 2 of the three west bound traffic lanes), suddenly veered to his left through the street car safety zone, immediately in front of an on-coming street car, and hit decedent, who was standing at the extreme westerly end of that zone."

The points on appeal are stated as follows: "(1) That the testimony for the prosecution is so incredible as not to justify its acceptance by the jury; and (2) That, even if the prosecution's theory of events should be accepted, the evidence fails to show gross negligence."

The fatal accident occurred at about 6:30 p. m. at the intersection of Portia Street and Sunset Boulevard, in Los Angeles. Portia Street, running north and south, intersects at right angles and deadends with Sunset Boulevard, an east-west arterial. Portia Street is 40 feet wide, and Sunset Boulevard is some 76 feet in width, of the two crosswalks extending across Sunset Boulevard at this intersection, the one on the east side of Portia is unmarked and 9 feet in width, and the one on the west side of Portia is marked and 17 feet wide. The northwest and northeast corners of the intersection are lighted by ornamental light standards and these lights are supplemented by lights from a gas station located on the northeast corner, and by lights from the windows of a drugstore situated on the northwest corner. There are also lighting standards on the south side of Sunset Boulevard, at the intersection. Visibility is good in the whole intersection. Pacific Electric street car tracks are laid east and west along Sunset Boulevard. On the northeast corner is a safety zone for westbound traffic, extending east 57 feet from the east edge of the unmarked crosswalk. There is a similar safety zone for eastbound street car traffic on the south side of Sunset Boulevard. There was evidence that conditions of visibility at the safety zone on the northeast corner were very good.

Mr. Burt Lehan, an engineer in the Engineering Department of General Motors, testified that on November 10, 1945, at 6:30 p. m., he was in his car waiting for an opportunity to turn left from Portia Street onto Sunset Boulevard. He saw the decedent, wearing dark clothes, standing inside the safety zone located on the northeast corner of the intersection about two feet from its west end. He first observed the appellant's car when it was approximately 15 feet from decedent Kasmer. Appellant was driving west on the north side of Sunset Boulevard between the safety zone and the north curb. Because of the rapidity with which events transpired, the witness was unable to form an estimate of the speed of appellant's car. Appellant's car was parallel to and either very near or just inside the safety zone, the witness being unable to distinguish because of the oblique angle of his vision. As appellant's car neared the intersection it turned to the left, angling across the west end of the safety zone. The paths of the wheels of appellant's car, as diagrammed by the witness, showed that the left wheels cut directly across the safety zone and that the right wheels passed just outside the northerly boundary and around the northwest corner of the safety zone. Appellant's car struck Kasmer, throwing him into the air, and carried him forward for approximately 80 feet. The body came to rest near the west crosswalk and the appellant's car stopped some 15 feet beyond the body. This testimony was corroborated by that of Robert G. Farr, a witness for the People. He was a motorman-conductor for the Pacific Electric Railway and was in charge of a westbound street car on Sunset Boulevard. He first observed Kasmer standing inside the safety zone, near the west end, when his street car was 150 feet from the intersection. Appellant's car passed the street car on the right-hand side at a speed of 40 miles per hour. The street car was 70 feet from the intersection when appellant's car cut through the safety zone and struck Kasmer. The body was thrown high in the air, enabling the witness to see it above the top of appellant's car. Appellant's car continued through the safety zone onto the street car tracks and continued west until it stopped about 15 feet beyond the body of decedent, which had been carried to a point 10 or 12 feet beyond the west edge of the west crosswalk. He saw appellant get out of his automobile from the left-hand side. Witness Henry Lederman for the People corroborated in part the testimony of the two preceding witnesses, testifying that he had driven slowly past the safety zone just prior to the accident and had noticed a person wearing a dark suit standing still in the safety zone. Officer Rogers testified that he picked up a hat belonging to the decedent in the northeast quarter of the intersection.

Appellant testified that he was driving in the left-hand lane of traffic on the street car tracks at approximately 25 miles per hour; that there were several automobiles but no street cars ahead of him; that when he arrived at the intersection of Portia and Sunset Boulevard, the decedent stepped in front of his car; that he had not seen the decedent prior to the time decedent stepped in front of the car; that he applied his brakes immediately upon seeing the decedent and that his brakes were in good mechanical condition. The impact was on the left front portion of the car, damaging the grill, radiator ornament and left front fender. He testified that he stopped his car, got out and found decedent lying about 15 feet to the rear of the car. His testimony was corroborated by that of his wife and son, who were riding with him. Mrs. Leitgeb testified that she saw decedent a "split second" and screamed just before the car struck him.

An attack is made upon the testimony of all the witnesses for the prosecution as incredible. The principal features of this testimony were in that of Farr, who estimated defendant's speed at 40 miles an hour, in the testimony of Lehan that decedent was standing inside the safety zone at the time he was struck, and in that of the witness Lederman, who had noticed a person wearing a dark suit standing in the safety zone immediately prior to the accident. When defendant's charge of incredibility of the testimony of these witnesses is examined, it is found to consist of an argument that their testimony was proved to be untrue by the contradicting evidence of defendant and his witnesses. The testimony of the State's witnesses was no more incredible than the testimony of the witnesses for defendant. While the versions of the two sets of witnesses were in direct conflict, the accident could have happened exactly as related by the State's witnesses or just as it was described by defendant and his witnesses. The testimony of Farr was positive and clear. Defendant argues that Farr's street car was nowhere near Portia Street when the accident occurred, and that he could not have witnessed it. He does not rely upon any inherent weakness in Farr's testimony but only upon the testimony of his own witnesses. One defense witness testified that after the accident she walked toward the east and saw a street car coming from the east about a block from Portia Street, another testified that the street car did not arrive until about 15 minutes after the accident, and another testified that it was more than a block to the east when the accident occurred and did not arrive for six or seven minutes thereafter. Other witnesses were not questioned as to whether they observed the street car. Arguments of the same nature are made concerning the testimony of the prosecution's other witnesses that the decedent was in the street car safety zone at the time he was struck and are equally without merit.

[1] Defendant's remaining point is that, giving full effect to the evidence of the prosecution, it was insufficient to prove gross negligence. The verdict of the jury is a conclusive determination, so far as this court is concerned, that the accident occurred in a manner consistent only with the evidence which tended most strongly to establish gross negligence of defendant in the operation of his car. We are therefore obliged to view the testimony of the People's Witnesses as if it was given full credit by the jury. Under this view of the facts, defendant was driving his car at 40 miles an hour, veered across a corner of, and struck decedent in, the safety zone. According to his own testimony, he did not see decedent until the instant he struck him. There was no evidence whatever as to any circumstance that would have made it necessary for defendant to invade the safety zone, nor was there any evidence of any obstruction in the street, or other condition which would have prevented defendant's seeing decedent standing in the safety zone. The corner was sufficiently lighted for other witnesses to see objects in the street.

[2, 3] The court defined gross negligence as follows: "It is such degree of negligence or carelessness as to amount to the want of slight diligence, an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an entire indifference to the property and persons of others and a conscious indifference to all consequences." Defendant does not question the correctness of this definition. His argument that his conduct, as described by the People's witnesses, does not measure up to this definition of gross negligence is again an argument on the facts. It is a question of fact for the jury to determine whether conduct in a given situation evidences negligence and, if it does, whether it is gross, ordinary, or slight negligence. We could interfere with the finding of the jury only if we were convinced that freedom from gross negligence was so clearly established by the evidence that reasonable minds could not differ upon the question. Malone v. Clemow, 111 Cal.App. 13, 295 P. 70. Not only was the conclusion of the jury a reasonable one, but in our opinion it was the more reasonable. There is not the least doubt in our minds that upon the state of facts which formed the basis of the verdict, appellant was guilty of gross negligence. Even if he had been driving at 25 miles an hour, as he claimed, our conclusion would be the same. It appears from his own testimony that he was driving past the safety zone at a speed which placed all the responsibility for avoiding injury upon persons who might be occupying the street at that point. He was not slowing down, nor did he have control of the car that would have enabled him to stop quickly if it should become necessary to do so in order to avoid an accident. He should have been especially cautious in approaching the safety zone and should have anticipated the presence of persons waiting for a car. He did not do this, but took a chance that no pedestrian would get in his way. His failure to see the pedestrian was unexplained. There are, of course, conditions in which it is difficult for motorists to see pedestrians on the streets, but the conditions here were not shown to have been unusual, and the only reasonable explanation of

defendant's failure to see the decedent is that he was not exercising even the slightest degree of care.

The judgment and order denying new trial are affirmed.

DESMOND, P. J., and WOOD, J., concur.

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77 Cal.App.2d 730

PEOPLE v. OLDERSON et al.

Cr. 500.

District Court of Appeal, Fourth District, California.

Jan. 20, 1947.

1. Rape 🔑51(4)

In rape prosecution, evidence that prosecutrix screamed and was struck in the face when prosecutrix was first forced into automobile, that she attempted to run away three times thereafter and each time was subjected to force, and every time prosecutrix "hollered" she was struck, that her eyes, ears and legs were injured, that her stomach was sore and that her injuries caused her to have a miscarriage was sufficient to show absence of consent.

2. Rape 🔑51(5)

In rape prosecution, evidence sustained finding that there was no unreasonable delay by prosecutrix in making complaint.

3. Criminal law 🔑1159(4)

In rape prosecution, evidence of prosecutrix' previous unchaste character, while it might have had a bearing in trial court on credibility of prosecutrix and probability of lack of consent, constituted merely part of conflicting evidence and would not be controlling on appeal.

4. Criminal law 🔑1159(2, 4)

The trial judge's determination as to credibility of witnesses and weight of evidence is conclusive where essential findings are sufficiently supported.

5. Rape 🔑51(4)

Evidence sustained conviction of rape by force.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Prentiss Olderson, Bryant Thompson and Milton Foster were convicted of rape, and they appeal.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with the crime of rape by force and violence, alleged to have been committed by each on the night of April 10, 1946. Each of the defendants pleaded not guilty and waived trial by jury. Each was found guilty by the court and sentenced to a term in the state penitentiary. They have appealed from the judgments entered against them, respectively. They also purport to appeal from a "denial of motion for a new trial" on the same date as the judgments. The record fails to show that such a motion was made. The appeal is based entirely on the insufficiency of the evidence.

There is evidence that the prosecuting witness was living with her husband and two children in a trailer near the outskirts of El Centro. During the evening of April 10, 1946, she spent several hours searching for her husband in bars and cafes in El Centro, and in asking friends of his if they had seen him. Toward midnight she started to walk home. The defendants approached in an automobile and stopped, one of them asking her if she wanted to ride. When she did not reply a hand was put across her mouth and another hand was placed around her throat. One of the defendants pushed her into the automobile while another held the door open, and the third was behind the steering wheel. She screamed and was hit in the face. The car was driven out along a country road. When it stopped she opened the door and ran. The defendants caught her and put her back in the car. The car was then driven to a house in the colored district of El Centro where it stopped for a few seconds. It was then driven back to the same country road and stopped near a canal. The prosecuting witness again got out and was again put back in the car. The car was then driven a short distance along the same road and stopped near a drainage ditch. The prosecuting witness again jumped out and ran, but was grabbed by two of the men and thrown to the ground. Parts of her clothing were torn off and each of the defendants then had sexual intercourse with her. She testified that she screamed and one of the defendants choked her; that after he had completed his act of intercourse he held her down on the ground while another defendant got in position; and that she then ran down the road when the third defendant caught her, beat her about the face, threw her down and proceeded to have intercourse with her. Two of the defendants walked away while the third act was being performed. The defendant Olderson then drove the car back to town and let her out about a block from the trailer court where she lived. She walked directly to her trailer. Her husband became angry because he had found her away from home when he arrived and so, without explaining the matter to him, she went to the phone booth in the trailer court and called the police, who arrived in about five minutes. The officers observed that her mouth was badly bruised, her neck seemed to be injured and her clothes were dirty and disarranged. A doctor examined her the next day and found that she was quite nervous, her face was scratched, there were bruises around her mouth and scratches on her legs. She was confined to her home and a hospital for six days, and two days later she had a miscarriage. Some time after 1 o'clock on the early morning of April 11, the investigating officers drove out to the place where the complaining witness had said the incidents occurred. They there found fresh car tracks and footprints, and also found torn parts of some clothing which had been worn by the prosecuting witness.

[1] At the trial each of the defendants admitted having had sexual intercourse with the complaining witness on this night and at this location, but each claimed it was with her consent. Appellants' first contention is that absence of such consent was not proved beyond a reasonable doubt. This contention is based entirely upon conflicting evidence and is without merit. There is abundant evidence that she screamed and was struck in the face when she was first forced into the automobile; that she attempted to run away three times thereafter and each time was caught and subjected to force; that every time she "hollered" she was struck; that she was struck many times that night by the defendants; that her eyes, ears and legs were injured; that her stomach was sore and her injuries caused her to have a miscarriage; and that she was also threatened with other physical violence. The evidence is ample to show the absence of consent. People v. Lay, 66 Cal.App.2d 889, 153 P.2d 379.

[2] It is next contended that there is no sufficient evidence of complaint and outcry. It is argued that the fact that the complaining witness failed to make any outcry while she was being taken home after the incidents occurred, and that she made no complaint to anyone from the time she was let out of the car until she reached home, "justifies strong inference that the act was with her consent." Not only would any such an inference merely add to the conflict, but the evidence clearly indicates that no such inference is possible. There was no occasion for her to make any outcry during the trip home. There was no one to complain to at the point where she was let out of the car. She immediately walked the block to her trailer, and from there to the telephone booth where she called the police. No unreasonable delay appears in the making of a complaint. People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703.

[3-5] The only other point raised is that "the record is replete with evidence of previous unchaste character of prosecutrix." While this may have a bearing in the trial court, going to the credibility

of the witness and the probability of lack of consent, it constitutes merely a part of the conflicting evidence and could not be controlling on this appeal. The trial judge's determination as to the credibility of the witnesses and as to the weight of the evidence is conclusive where, as here, the essential findings are sufficiently supported. The evidence is entirely sufficient to support the judgments.

The judgments are affirmed and the purported appeal from the denial of a motion for a new trial is dismissed.

MARKS, and GRIFFIN, JJ., concur.

77 Cal.App.2d 783

NELSON v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 7304.

District Court of Appeal, Third District, California.

Jan. 25, 1947.

Rehearing Denied Feb. 13, 1947.

1. Mandamus 🔑26

A court may be compelled by mandamus to act jurisdictionally but cannot by that means be compelled to act correctly.

2. Mandamus 🔑4(4)

Where trial court in refusing to grant motion to set aside robbery information on ground that at preliminary hearing petitioner was not properly advised of his constitutional rights, acted judicially but had not refused to act at all, mandamus would not lie to compel trial court to grant motion since to allow writ so to be used would be equivalent of making mandamus a writ of error. Const. art. 1, § 8.

3. Criminal law 🔑1134(10)

Order denying motion to set aside information is reviewable on appeal from judgment of conviction. Pen.Code, § 1259.

4. Mandamus 🔑4(4)

The fact that order refusing to set aside information on ground that at preliminary hearing petitioner was not properly advised of his constitutional rights was only reviewable on appeal from judgment of conviction, would not authorize mandamus commanding trial court to set aside information on ground that remedy at law was inadequate. Const. art. 1, § 8.

Original mandamus proceeding by T. C. Nelson against the Superior Court of the State of California in and for the County of Sacramento and another, for an order commanding the respondents to grant petitioner's motion to set aside an information.

Writ denied.

George L. Popert, of Sacramento, for appellant.

J. Quincy Brown, Dist. Atty., and John B. Heinrich, Dep. Dist. Atty., both of Sacramento, for respondent.

PEEK, Justice.

By mandamus petitioner seeks an order of this court commanding respondent Superior Court to grant his motion previously made in said court to set aside an information charging him with the crime of robbery. The sole ground for said motion both in the respondent court and here is that at the preliminary hearing of petitioner on said charge he "was not properly advised of his constitutional rights."

The petition alleges that at the preliminary examination the committing magistrate purported to inform petitioner of his constitutional rights including the right to aid of counsel but that said magistrate did so in a manner which was not in strict conformance with the requirement of Article I, section 8 of the Constitution of this state.

It is petitioner's contention that inasmuch as all of the provisions of the Constitution are mandatory unless specifically declared to be otherwise, and inasmuch as said Article I, section 8 states categorically what information on these fundamental matters must be given to an accused person, the precise constitutional language must be used, and therefore the alleged failure of the magistrate to advise petitioner in such language placed upon respondent court an absolute nondiscretionary duty in acting upon petitioner's motion to set aside the information. Petitioner further alleges that he has no plain, speedy or adequate remedy at law.

Respondents' reply denies the material allegations of the petition and in their points and authorities filed in support of their demurrer and answer, they argue (1) that mandamus cannot be invoked to correct alleged errors of a court in passing upon questions regularly submitted to it in the ordinary course of judicial proceedings; (2) that mandamus will not lie where there is an adequate remedy at law, and (3) that in any event petitioner was fully advised of his constitutional rights by the committing magistrate.

From the record before us it appears that the respondent court did not refuse to act upon petitioner's motion to set aside the information. To the contrary a hearing was had thereon, evidence was taken, and a formal order was entered. In other words this is not a case where a court has refused to act at all in the premises, but rather it is a case where a court has acted judicially and its order, whether or not ill advised, still was one which it was empowered to make.

[1, 2] Thus it is stated in 16 Cal.Jur., page 822, section 35, that where, instead of refusing to act "the court has acted judicially, its action may not be controlled by the writ, for to allow the writ so to be used would be equivalent to making it a writ of error." Or, as stated in Lincoln v. Superior Court, 22 Cal.2d 304, at page 313, 139 P.2d 13, at page 18, citing Hilmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 175, the court "May be compelled to act *jurisdictionally* but cannot by that means be compelled to act *correctly*." It therefore follows that if the court has so acted, however erroneous such action may be, its order made pursuant thereto cannot be corrected by means of writ of mandamus. To hold in accordance with petitioner's contention and allow the writ in such a case would be the equivalent of making mandamus a writ of error. 16 Cal.Jur. 822; Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042.

[3, 4] If the action of the court below in refusing to grant petitioner's motion should prove to be erroneous, such error may be corrected on appeal. While it is true that the Penal Code makes no provision for an appeal from an order denying a motion to set aside an information (Penal Code, sec. 1259), nevertheless such an order is reviewable on an appeal from a judgment of conviction. 8 Cal.Jur., p. 561; People v. Simmons, 119 Cal. 1, 50 P. 844; People v. Williams, 8 Cal.App. 595, 97 P. 684. Such a review will be presumed to be a plain, speedy and adequate remedy, in the absence of a showing to the contrary. The mere fact that appeal may not be so expeditious as mandamus does not of itself make the remedy by appeal inadequate. Andrews v. Police Court, supra; McDonough v. Garrison, 68 Cal.App.2d 318, 328, 156 P.2d 983.

The principal case cited by petitioner, Harris v. Municipal Court, 209 Cal. 55, 62, 63, 285 P. 699, presented one of those situations where the general rule, fully recognized by the supreme court, could not be applied. There the petitioner in mandamus had no other remedy at all. The prosecution had delayed and was continuing to delay for an unreasonable time the trial of the case, for what was alleged to be an illegal purpose. The refusal of the trial court to dismiss the complaint or make any other appropriate order operated to postpone indefinitely the opportunity which petitioner otherwise would have had to have the matter remedied by appeal. No comparable circumstance is shown to exist in the present case.

The writ is denied.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 656

BARONE et al. v. JONES et al.

Civ. 7295.

District Court of Appeal, Third District, California.

Jan. 16, 1947.

Hearing Denied March 13, 1947.

1. Evidence ⚿359(3), 380

In automobile collision case, photographs, though taken long after collision, were properly admitted to show general condition of highway with relation to ditch, where only change in highway when photographs were taken was that shoulder had been increased two or three feet on each side of highway, and presence of vehicles in photographs that were not there at time of collision was explained by witnesses when photographs were offered in evidence.

2. Appeal and error ⚿970(2)
Evidence ⚿359(3)

Whether proffered photograph of scene of automobile accident involved in litigation fairly depicts location and surrounding objects that are pertinent to issues involved is discretionary with trial court, and, in absence of apparent abuse of discretion or an affirmative showing of prejudice, order admitting or rejecting a photograph will not be disturbed on appeal.

3. Automobiles ⚿246(60)

Instructions that if plaintiffs proved that defendants left truck and trailer with which plaintiffs collided parked on public highway, outside of a business or residence district, and left them unattended during nighttime, plaintiffs thereby established a prima facie case of negligence, and burden then was on defendants to show by a fair preponderance of the evidence that it was not practicable for driver to park truck and trailer off main traveled or paved portion of highway, were not erroneous as imposing too great a burden on defendants. Vehicle Code, §§ 582–584.

4. Automobiles ⚿245(17)

Questions whether a defendant's motor vehicle was parked on paved portion of highway contrary to statutes, and whether vehicle was so disabled within meaning of statute as to excuse the defendant from violating the statutes, are for trier of facts in an automobile accident case. Vehicle Code, §§ 582–584.

5. Automobiles ⚿244(14)

Evidence sustained jury's finding that defendants' truck and trailer, with which plaintiffs collided, were not so disabled as to render it necessary for driver to park on paved portion of highway within meaning of statute excusing the parking of a disabled vehicle on the highway when it is impossible to avoid leaving the vehicle on the highway. Vehicle Code, §§ 582-584, 590.

◆

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Gus J. Barone and Alvina M. Barone against Lennis Jones and William E. O'Brien, to recover for damage sustained in automobile collision. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Hawkins & Hawkins, of Modesto, and Lasher B. Gallagher, of Los Angeles, for appellants.

Robinson & Cornell, of Merced, for respondents.

THOMPSON, Justice.

The defendants, Lennis Jones and William E. O'Brien, have appealed from a judgment which was rendered against them pursuant to the verdict of a jury, for damages and personal injuries sustained by plaintiffs as the result of driving their automobile into the rear end of a truck and trailer which were left parked on the public highway.

It is conceded that the judgment is supported by the evidence. The appellants, however, contend that the court erred in receiving in evidence photographs of the highway at the scene of the accident which were subsequently taken after material changes of the highway had occurred, and that they were prejudiced by the giving of certain alleged erroneous instructions.

Lennis Jones owned the truck and trailer which were involved in the collision. William E. O'Brien was the operator of those vehicles. They were 8 feet in width and their combined length was 54 feet. Their total weight was 19,700 pounds. They were loaded with merchandise weighing 33,000 pounds. The highway was level and straight at the point where the accident occurred. It extended north and south at that place. The paved portion of the highway was 22 feet in width, with a white stripe along the center line. An oiled strip extended, adjacent to the macadam portion, two additional feet in width. Beyond the oiled strip there was a six-foot dirt shoulder extending to the edge of a ditch, on the side where the truck was parked. It was, therefore, 19 feet from the center line of the highway to the ditch. The surface was solid to the edge of the ditch. There is some conflict of evidence in that regard.

March 1, 1945, O'Brien left Oakland about 10 A.M., driving the truck and trailer loaded with creamery bottles. He was traveling southerly. At about 12:30 P.M., when he reached a point approximately one-half mile south of Crows Landing, a connecting rod broke. He then drove his truck partly off the paved portion of the highway on his right-hand side, and left it parked on the west side of the highway, where it remained for about ten hours. Mr. McCabe, the highway traffic officer, who visited the scene of the accident about half an hour after it occurred, testified that he found the truck parked over the paved portion about five feet. He said he measured the distance "from the left rear of the body on the trailer to the center stripe" of the highway, which he found to be "six feet".

Mr. O'Brien testified that after he parked his truck, he went to Crows Landing to obtain a connecting rod with which to replace the broken one, but that it was necessary to procure that rod from Oakland; that delivery of the rod could not be made until the following day; that he therefore returned to his truck, about 5:30 P.M., and placed flare-pots or warning signals upon the highway as required by Section 590 of the Vehicle Code, after which he again left the machine. There is a conflict of evidence regarding the location of the flares.

About eleven o'clock that night the plaintiff, Gus Barone, accompanied by his wife, drove their Pontiac sedan automobile from Modesto, southerly, on their way to Newman. It was raining and dark. Their machine was in good mechanical condition. They were traveling at the rate of about 35 miles per hour, along their proper side of the highway. After crossing a railroad track and making a slight turn they reached a level straight stretch of the highway in the vicinity of Crows Landing. Suddenly they saw a light 50 or 60 feet ahead of their machine, which they assumed was the tail light of another car. Mr. Barone immediately applied his brakes, but was unable to stop his machine. It crashed into the rear end of defendants' parked trailer. Their machine was damaged and Mr. and Mrs. Barone were seriously injured. Both plaintiffs testified that they saw no flare pot on the highway, and that they did not run over one.

Mr. McCabe, the highway traffic officer, testified that he was notified of the accident, and arrived at the scene of the crash within twenty or twenty-five minutes; that neither the tail light nor the clearance lights on the truck or trailer were burning; that he found one flare about twenty-five feet to the rear of the trailer; that he turned on the tail light and clearance lights on the truck, and carried the flare back to the proper distance of 100 feet behind the trailer and placed it on the highway, and that he also carried the front flare forward and placed it on the highway about 100 feet in front of the truck.

The appellants assign as prejudicial error the admission in evidence, over their objections, of several photographs taken at the scene of the accident, long after it occurred, on the grounds that the highway had been subsequently changed and that the pictures included vehicles which were not present at the time of the collision.

[1] We are of the opinion there was no abuse of discretion on the part of the trial judge in admitting the photographs in

evidence. The photographs were not admitted as a stage setting to mislead the jury. They were admitted to show the general condition of the highway with relation to the ditch. The only change in the highway which occurred between the time when the accident occurred and the time when the pictures were taken, was that the oiled gravel border adjacent to the paved portion had been increased from two feet to about three feet in width on either side of the highway. Some vehicles which were passing along the highway, and possibly some which were standing in that vicinity when the pictures were taken, were not there at the time of the accident. All of those changes were particularly explained by witnesses before the photographs were offered in evidence. We cannot perceive how the jury could have been misled or prejudiced by an examination of those pictures. Photographs of the scene of an accident, which fairly depict the condition of a highway with relation to a parallel ditch and other pertinent objects, are not incompetent merely because some unimportant changes are made before the pictures are taken, or that other unrelated objects appear, when such changes are fully explained to the jury so that it will not be misled thereby. Bateman v. Doughnut Corp. of America, 63 Cal.App.2d 711, 718, 147 P.2d 404; McNair v. Berger, 92 Mont. 441, 15 P.2d 834, 838; 32 C.J.S., Evidence § 715, p. 623. In the authority last cited it is said:

"The fact that there has been changes in conditions, including even substantial changes, will not necessarily exclude a photograph where the changes can be and are explained, so that the photograph, as explained, will give a correct understanding of the condition existing at the time to which the controversy relates."

In the McNair case, supra, the admission of photographs taken two years after a collision of automobiles occurred on a public highway were held to be competent evidence of the condition of the highway at the time of the accident, even when it appeared that the shoulders thereof had been changed, similar to the change in the present case. The court said in that decision:

"The pavement was the same when the pictures were taken as when the accident occurred, and the general condition of the road was the same with the exception of the graveled shoulders, which was fully explained in the evidence. * * * It was not error to admit the photographs in evidence."

[2] It is the province of the trial judge to determine whether a proffered photograph of the scene of an accident involved in the litigation fairly depicts the location and surrounding objects which are pertinent to the issues involved in the case. In the absence of an apparent abuse of discretion, or an affirmative showing of prejudice, the order admitting or rejecting a photograph will not be disturbed on appeal. Olson v. Meacham, 129 Cal.App. 670, 673, 19 P.2d 527; Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765; 32 C.J.S., Evidence, § 716, p. 625; 10 Cal.Jur. p. 896, sec. 169.

[3] Finally, the appellants assign, as prejudicially erroneous, the giving of plaintiffs' instructions numbered 7, 8 and 9, which, in effect, directed the jury that if plaintiffs proved that the defendants left their truck and trailer parked on the public highway, outside of a business or residence district, and left them unattended during the night time, they thereby established a prima facie case of negligence and that the burden would then be imposed on the defendants to show "by a fair preponderance of the evidence that it was not practicable for O'Brien to park said truck off of the main-traveled or paved portion of said highway."

We are of the opinion the court did not err in giving to the jury the said challenged instructions. We have read the entire charge to the jury which appears in the appendix to defendants' opening brief. The jury was very fully, fairly and correctly instructed on the essential principles of law which are involved in this case. In instruction number 4, sections 582, 583 and 584 of the Vehicle Code, which are applicable to this case, were given to the jury in the language of the statute. Section 582 provides that a vehicle shall not be parked on the paved or improved or main traveled portion of the highway when it is *practicable* to leave the machine off of such portion of the highway. Section 583 provides that when it is left standing on such portion of the highway, not less than 20 feet of such paved or main traveled portion of the highway shall be left "Clear and unobstructed for the free passage of other vehicles." Section 584 provides that the previously mentioned restrictions shall not apply to a "disabled" vehicle when it is left on the highway "in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such *disabled* vehicle upon such part or portion of said highway."

The court properly instructed the jury that if it was satisfied from the evidence that the defendant, Mr. O'Brien, left the truck and trailer parked on the paved portion of the public highway, contrary to the provisions of Section 582 of the Vehicle Code, that fact established a prima facie case of negligence on the part of the defendants, and that defendants then had the burden of proving "by a fair preponderance of the evidence that it was not practicable," under the circumstances of the case, to have parked the vehicles "off of the main-travelled or paved portion of said highway." Thomson v. Bayless, 24 Cal.2d 543, 546, 150 P.2d 413; Scoville v. Keglor, 27 Cal.App.2d 17, 32, 80 P.2d 162; Casey v. Gritsch, 1 Cal.App.2d 206, 211, 36 P.2d 696; Callison v. Dondero, 51 Cal.App.2d 403, 408, 124 P.2d 852. In the Thomson case, supra [24 Cal.2d 543, 546, 150 P.2d 414], the Supreme Court said:

"* * * The courts in this state have uniformly held for the past 12 years that a prima facie case of negligence is established under section 582 by proof that the vehicle was left on the paved portion of the highway outside of a business or residential district and that the burden to show that it was not practicable to drive off the main traveled portion of the highway rests upon the operator of such vehicle."

In the Casey case, supra, [1 Cal.App.2d 206, 211, 36 P.2d 698], quoting with approval from Watt v. Associated Oil Co., 123 Or. 50, 260 P. 1012, the court said:

"* * * 'One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute.'"

Likewise, in the case of Callison, supra, [51 Cal.App.2d 403, 408, 124 P.2d 855], the court declared the same principle of law as follows:

"Having shown that the appellant did park his truck on the paved portion of the highway, and leave it unattended for a period of time, contrary to the provisions of the foregoing sections of the code [Secs. 582 and 583 of the Vehicle Code], the burden was on him to show that it was not practicable for him to drive his machine off the highway on the shoulder thereof, and that he was not otherwise guilty of negligence in violating the provisions of those sections of the code."

[4] It will be observed that the challenged instructions do not charge the jury that the burden is on the defendants to prove they were not guilty of negligence. It is merely stated that, having established a prima facie case of negligence by showing that the defendants left their truck and trailer parked on the paved portion of the highway, it becomes the duty of the defendants to then prove, in accordance with the provisions of Section 584 of the Vehicle Code, that their truck was so "disabled" that it was "impossible to avoid stopping and temporarily leaving such disabled vehicle upon such part or portion of said highway." That merely means that when the plaintiffs have established a prima facie case of negligence by showing that defendants violated the previous sections of the code, the defendants must prove that they were excused from violating the statute because they were unable to prevent it on account of the disability of their vehicle as provided by Section 584. The questions of whether the defendants'

vehicles were parked on the paved portion of the highway contrary to Sections 582 and 583, and whether their vehicles were so disabled as specified in the following section, are problems for the determination of the jury or the trial court. Scoville v. Keglor, supra, 27 Cal.App.2d at page 33, 80 P.2d 162. The burden of "proving negligence," which is always imposed on plaintiffs, and the burden of "producing evidence," on the part of defendants, to rebut or excuse such proved negligence, are entirely different and distinct principles of law, or rules of evidence.

[5] The cases relied on by the appellants in support of their contention that the challenged instructions imposed too great a burden on them by declaring that they must prove the disability of their vehicles "by a fair preponderance of the evidence," are all based on the rule of evidence involving the doctrine of res ipsa loquitur, as illustrated by the cases of Allbritton v. Interstate Transit Lines, 31 Cal. App.2d 149, 87 P.2d 704; Smith v. Hollander, 85 Cal.App. 535, 259 P. 958; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; and Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 168 P.2d 457. In such cases, where the mere inference of negligence is primarily established by proof of facts showing that the doctrine of res ipsa loquitur is properly involved, it was said that it is necessary for the defendants to rebut the inference of negligence on that account by proof which merely balances, offsets or equals the evidence regarding the application of res ipsa loquitur. But that rule of evidence is entirely different from the one which is involved in this case, in which affirmative proof of negligence was adduced by the plaintiffs by showing that the defendants violated an express prohibition of the statute. In the present case there was substantial evidence that defendant O'Brien parked his truck and trailer on the paved portion of the highway; that the distance from the truck to the center white line of the highway was only about six feet; that he did not leave 20 feet of the paved portion of the highway "unobstructed;" that at least four or five feet remained between the outer side of his truck and the ditch on his right hand side, a portion of which he might have used to give approaching vehicles greater safety in passing his parked vehicles; that the opposite side of the highway had a much wider shoulder and might have been used without violating the statute, and that his truck was not so disabled as to prevent him from operating it on its own power, or so as to make it "impossible to avoid stopping" on the paved portion of the highway in the dangerous position which his truck occupied for some ten hours, a portion of which time was after dark, and that he failed to place warning signals, or flares, the proper distance of 100 feet in advance and to the rear of his parked vehicles, as provided by Section 590 of the Vehicle Code. Regarding the question as to whether the truck was so disabled as to render it impossible to drive it on its own power to a safe parking place, the operator, William O'Brien, testified that the truck merely had one broken rod connecting it with a piston in a cylinder, and that he did drive the truck a short distance after the rod broke. In response to the question, "Was there anything * * * to have prevented you driving say either to the left across the highway or another 6 feet ahead in the same direction you were traveling?" he replied, "Nothing other than taking a chance of breaking the block." The jury was therefore warranted in finding that the machine was not so disabled as to render it necessary to park on the paved portion of the highway.

We conclude that the challenged instructions were not prejudicially erroneous.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

PEOPLE v. CODINA.*

Cr. 2422.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1947.

1. Infants ⚷20

Where information attempting to charge offense of contributing to delinquency of a minor merely alleged that lewd acts were committed on person of minor child involved and did not allege that such acts caused, tended to cause, or encouraged child to come within scope of statute regarding jurisdiction of juvenile court, the information did not state a public offense. Pen.Code, § 952; Welfare and Institutions Code, §§ 700, 702.

2. Indictment and information ⚷109

An accused in a criminal case is entitled to a fair statement in the information or indictment of an offense described in a statute.

3. Criminal law ⚷1032(5)

Where information failed to charge an offense but demurrer was not interposed, an objection that court lacked jurisdiction could be raised on appeal.

4. Criminal law ⚷878(4)

Verdict of acquittal on count charging violation of statute regarding crimes against children and conviction on count charging offense of contributing to delinquency of minor would not be inconsistent. Pen.Code, § 288; Welfare and Institutions Code, § 702.

◆

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Alfonso Codina, alias James Tessaro, was convicted of contributing to the delinquency of a minor, and he appeals.

Reversed and information ordered dismissed.

Richard C. Dinkelspiel, Alan A. Dougherty, and Douglas M. Moore, all of San Franscisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

WARD, Justice.

On April 8, 1946, an information was filed against defendant and appellant alleging in the first count a violation of Penal Code section 288, and in a second count a violation of Welfare and Institutions Code, section 702. The defendant was acquitted on the first count. The record shows that "We, the Jury in the above entitled cause, find the defendant Alfonso Codina, alias James Tessaro guilty of the crime of misdemeanor, to-wit, violating section 702 of the Welfare & Institutions Code, as charged in count two of the Information."

The defendant on appeal asserts that the prosecuting attorney made misstatements of facts, which were prejudicial to defendant; that the evidence was insufficient to support the verdict. In view of the conclusion reached on this appeal it is not necessary to consider the alleged prejudicial remarks. On the second point the sufficiency or insufficiency of the evidence was a question of fact. The complaining witness, a minor child, testified to facts which, if believed by the jury, would sustain the findings of the jury if the information jurisdictionally stated a criminal offense.

[1] The information in this case does not state a public offense. The Attorney General frankly states his position as follows: "It is contended by appellant that the information does not charge a crime or state facts sufficient to constitute a public offense. The point seems to be well taken. In charging the offense under section 702, the information merely alleges in substance that lewd acts were committed upon the person of the minor child involved. It does not allege that such acts caused, tended to cause, or encouraged the minor child to come within the scope and purview of section 700 of the Welfare and Institutions Code. It has been held that the gravamen of the offense is the tendency of the act or omission, and no offense is charged where the information does not allege that the act tends to cause the minor to become a person countenanced by the juvenile court

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* Subsequent opinion 181 P.2d 881.

law. People v. Salisbury, 59 Cal.App. 299, 210 P. 642; People v. Lamanuzzi, 77 Cal. App. 301, 303, 246 P. 557."

[2] An accused in a criminal case is entitled to a fair statement in the information or indictment of an offense described in a statute. In People v. Bergotini, 172 Cal. 717, 158 P. 198, the defendant was charged with contributing to the delinquency of certain minors. It was held that an information which set forth certain acts and then failed to allege how such acts contributed to the alleged delinquency was fatally defective. That is the situation in the instant case.

Penal Code section 952 provides that the charge in an information or indictment may be stated in the language of the statute, but in the present case the very pertinent language of sec. 702, Welfare and Institutions Code, namely, that the act or acts enumerated in the information caused or tended to cause the minor child "to become or to remain a person," such as described in any of the subdivisions of section 700, is lacking.

[3] A demurrer was not interposed but an objection that the court lacked jurisdiction may be raised on appeal, as such objection is directed to the gist of the real foundation of the institution of the criminal procedure. People v. Smith, 103 Cal. 563, 37 P. 516; People v. Kinsley, 118 Cal. App. 593, 5 P.2d 938.

[4] The contentions that appellant has been once in jeopardy and that the two verdicts are inconsistent, and that as a result the verdict of guilty was a nullity, appear to have been answered adversely to appellant in Rodriguez v. Superior Court, 27 Cal. 2d 500, 165 P.2d 1, and the cases cited therein construing section 954 of the Penal Code, by which decisions this court is bound.

The judgment and order denying a new trial are reversed. Inasmuch as the information does not charge a public offense, the trial court is ordered to dismiss the information. People v. Schweichler, 16 Cal.App. 738, 117 P. 939.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

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77 Cal.App.2d 647

In re HENDRIX' ESTATE.

CALIFORNIA TRUST CO. v. BURNELL INSTITUTE OF SPIRITUAL INSTRUCTION et al.

Civ. 15297.

District Court of Appeal, Second District, Division 3, California.

Jan. 16, 1947.

1. United States 🔑55

A bequest to the United States Veterans Administration was a bequest to the United States of America, notwithstanding that Veterans Administration was a mere governmental agency which might be abolished.

2. United States 🔑55

The United States was a "corporation" within provision of Probate Code authorizing testamentary dispositions to corporations. Probate Code, § 27.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

3. Army and navy 🔑52

The Veterans Administration, as successor of the "National Home for Disabled Volunteer Soldiers", a corporation, was authorized to take property by will under federal act creating the corporation and authorizing it to recieve donations of money or property. Act Cong. March 3, 1865, 13 Stat. 509; 24 U.S.C.A. § 136; Act Cong. July 3, 1930, 46 Stat. 1016.

4. Wills 🔑750

Whether legacy was specific or residual was to be determined from the will as a whole, and intention of testatrix as expressed in will was determinative. Probate Code, §§ 101, 103, 161, 163.

5. Wills 🔑587(1), 736

Under will devising specific items of testatrix' property to three named persons and providing that her Ohio property should be sold, that a portion of proceeds should be paid to named individual, and that balance should go to Veterans Administration and a named institute, Veterans Administration and the institute were residuary legatees, and debts and expenses of administration were properly charged against their interests. Probate Code, §§ 101, 103, 161, 163, 750.

6. Executors and administrators ⚿496(2)

Under Probate Code, compensation of executor and his attorney was properly computed upon amount of estate accounted for, including not only California property, but also proceeds from sale of Ohio property. Probate Code, §§ 900, 901, 910.

7. Wills ⚿736

Where services of executor and his attorney for which extraordinary compensation was allowed were occasioned by alleged uncertainties in residuary clause questioned by one of residuary legatees, charging of administration expenses against residuary interests was not subject to objection that allowances for extraordinary services should have been charged against interest which occasioned the services.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Wilafred Hazel Hendrix, also known as Wilafred Hazel Scott, wherein the Burnell Institute of Spiritual Instruction filed objections to the final account of the California Trust Company under which distribution was ordered to the United States Veterans' Administration and Arthur Smittcamp. From the decree of distribution, the Burnell Institute of Spiritual Instruction appeals.

Decree affirmed.

Percilla Lawyer Randolph, of Los Angeles, for appellant.

Harold Judson, Asst. Sol. Gen., Charles H. Carr, U. S. Atty., and Ronald Walker and Clyde C. Downing, Asst. U. S. Attys., all of Los Angeles, and John T. Fowler, Department of Justice, of Washington, D. C., for respondent U. S. Veterans' Administration.

Carl B. Sturzenacker, of Los Angeles, for respondent Arthur Smittcamp.

SHINN, Justice.

By the will of Wilafred Hazel Hendrix, the executor was directed to pay all just and provable debts, funeral expenses, expenses of last illness and of administration. The estate which remained was disposed of as follows: Arthur Smittcamp was given the real property which was the home of the decedent, furniture, motor vehicles, equipment, livestock, poultry, etc., on the premises, and all money on deposit in banks in the State of California; Mary Lamoreaux Burnell was given Mrs. Hendrix' books and papers pertaining to metaphysics and "Instruction in Truth"; a former husband, George H. Scott, all shares of stock of Scott and Fitzer Company owned by Mrs. Hendrix, and provision was made in paragraph Eighth reading as follows: "At the present time I own property in the City of Lakewood, County of Cuyahoga, State of Ohio, which is of record in my former name of Wilafred Hazel Scott, and I hereby authorize my executor to appoint such ancillary administrator therein as may be required, but if for any reason my executor cannot make such appointment, then I nominate and appoint Ray D. Johnson of Van Nuys, California, to be the ancillary administrator for my estate located in said State of Ohio. I direct that my property in said State of Ohio be forthwith sold and of and from the sale proceeds I give, devise and bequeath to said Arthur Smittcamp the sum of Nineteen Hundred and Twenty Dollars, and the remainder thereof together with any residue of my estate that there may be I give, devise and bequeath in equal shares, share and share alike, to United States Veterans Administration and Burnell Institute of Spiritual Instruction—a nonprofit California corporation, whose principal place of business is located in Los Angeles County, California—for the purpose of rendering to disabled veterans of the world war and the adherents of said Institute, such aid, comfort, assistance and spiritual instruction as may to them be most helpful and profitable, determinable by said respective organizations."

The first account of the executor was approved and an order was made for partial distribution, under which some property was distributed. A second and final account was filed showing the estate left for distribution to be of the value of $14,229.10, of which $4,729.10 was in cash and the remainder real estate which was devised to Arthur Smittcamp, of the appraised value of $9500. The account was settled and distribution was ordered. So far as material here, the decree distributed the real property to Arthur Smittcamp, distributed to his assignee $1920, less certain deductions on an adjustment of accounts, from the proceeds of the sale of the Ohio property, and distributed to the United States Treasury for credit to the "General Post Fund National Homes, Veterans' Administration" and to Burnell Institute of Spiritual Instruction all the rest, residue and remainder of the estate in equal shares, "provided that the proper adjustment shall be made from the share of the Burnell Institute of Spiritual Instruction of $268.88 paid to the State of Ohio for inheritance taxes on its share of the estate." Approximately $8,000 was received by the executor from the ancillary administrator in Ohio as proceeds from the sale of the real property in that state. This amount had been reduced by payment of debts and expenses, as shown by the final account.

The Burnell Institute has appealed and presents the following grounds therefor: (1) That United States Veterans' Administration is not qualified under the laws of California to take property by will and that the shares of the estate distributed to it should have gone to the Institute as residuary legatee; (2) that the debts of decedent, the expenses of last illness, the funeral, and of administration were improperly charged against the interests of the Veterans' Administration and the Institute, for the reason that all devises and bequests were specific and were chargeable proportionately with such debts and expenses. Other points presented on the appeal will be mentioned later.

Section 27 of the Probate Code reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The institute filed objections to the final account, which caused the court to have a trial and to consider the questions which are presented upon the present appeal. The court reached the following conclusions of law:

"That the bequest to the United States Veterans Administration is in fact, in contemplation of law, a bequest to the United States of America, and that the United States of America is a person or corporation authorized to take by will pursuant to Section 27 of the Probate Code of the State of California and is entitled to receive the bequest under the Will of Wilafred Hazel Hendrix, deceased.

"That all of the bequests in said will to the United States Veterans Administration and the Burnell Institute of Spiritual Instruction are residuary bequests and not specific or general bequests.

"That the Court's construction of said Will is that the intent of the testatrix was to give to the United States of America in such a manner as would benefit the United States Veterans Administration and that the United States Treasury General Post Fund National Homes, Veterans Administration, is the proper legatee of said funds.

"It was the intent of the testatrix to place the said remainder of the proceeds of the sale of the Ohio property in the residue of the estate and all of the bequests to the Veterans Administration and the Burnell Institute of Spiritual Instruction were residuary in nature and not special or general bequests."

Appellant's contention on the first point, stated briefly and without citation of authority, is that the Veterans' Administration is solely an administrative agency "which can be abolished, enlarged, deprived of all powers, duties and functions at the will and whim of Congress," and that the bequest to such agency is in no sense a bequest to the United States. It is said that it is neither a natural person nor a corporation, and hence is not qualified to accept the bequest.

[1] The Veterans' Administration is, of course, a governmental agency, and not the government. But the same may be said of the many other agencies, incorporated and unincorporated, and the several departments, branches and subdivisions which go to make up the structure of government. They all have existence solely as component parts of the government and it is through them that the government functions. The agency in its own authorized field of operations acts as an arm of the government and its acts are those of the government. Whatever property it acquires and holds is the property of the government. The "General Post Fund National Homes" is a designation of an operating department within the Veterans' Administration. It is clear to us that there was no error in holding that the bequests to the agency was, in effect, a bequest to the parent, United States of America.

[2] We entertain no doubt that the United States Government is a corporation within the meaning of section 27 of the Probate Code. Corporations are either public or private; each constitutes a class as distinct as the other. When the word "corporation" is used in the Constitution or a statute, it may mean only private corporations (Napa State Hospital v. Dasso, 153 Cal. 698, 96 P. 355, 18 L.R.A.,N.S., 643, 15 Ann.Cas. 910); it may mean only public corporations (People v. Turnbull, 93 Cal. 630, 29 P. 224), and as used in former section 1275 of the Civil Code, upon which section 27 of the Probate Code is based, has been held to mean public as well as private corporations (Estate of Bulmer, 59 Cal. 131). It all depends upon the sense in which the word is used. The United States Government is a corporation. Van Brocklin v. State of Tennessee, 117 U.S. 151, 154, 6 S.Ct. 670, 29 L.Ed. 845; Respublica v. Sweers, 1 Dall. 41, 44, 1 L.Ed. 29; State of Ohio v. Helvering, 292 U.S. 360, 370, 54 S.Ct. 725, 78 L.Ed. 1307; State of Georgia v. Evans, 316 U.S. 159, 161, 62 S.Ct. 972, 86 L.Ed. 1346.

The state, counties and municipalities are authorized to take property by will, as well as private corporations formed for certain purposes, and also those that are expressly authorized by statute to take. In declaring the policy of the state in the enactment of section 27, the legislature could scarcely have entertained a purpose to allow property to be taken by the states and by counties and local public corporations for the benefit of comparatively small groups of citizens and to deny that privilege to the United States Government, through which property would be put to beneficial use upon a much larger scale. And in impliedly extending the right to take by will to corporations expressly authorized by law to take, the legislature has not distinguished between private and public corporations.

[3] The Veterans' Administration is authorized by statute to take property by will. It is the successor of a corporation, "The National Home for Disabled Volunteer Soldiers," created by Act of March 3, 1865, c. 91, 13 Stat. 509. The corporation was authorized "to receive all donations of money or property, made by any person or persons, for the benefit of the asylum, and to hold or dispose of the same for its sole and exclusive use." By subsequent amendment, June 25, 1910, c. 384, sec. 1, 36 Stat. 736, 24 U.S.C.A. § 136, application for membership in the home was declared to constitute "a valid and binding contract between such applicant and the Board of Managers," by which personal property of a member who left no heirs surviving and which he had not disposed of by will would "pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member." These provisions, and contracts executed thereunder, were held to be valid in United States v. Stevens, 302 U.S. 623, 626–628, 58 S.Ct. 388, 82 L.Ed. 484, and in the cases therein cited. The authorization of the Managers to receive donations of money or property was, in

terms, broad enough to embrace gifts by means of will, as well as by transfers during the lifetime of the donors. In expressing the purpose of encouraging gifts for the benefit of the asylum, the word "donations" was aptly chosen and it should be given the usual interpretation, and as meaning all acquisitions of money or property coming to the asylum for which nothing is given in return. By Act of Congress of July 3, 1930, c. 863, 46 Stat. 1016, the President was authorized to combine "The National Home for Disabled Volunteer Soldiers," and other agencies, in the Veterans' Administration. This was accomplished, and the Administration now exercises all the powers formerly exercised by the governing body of its predecessor.

In Estate of Yule, 57 Cal.App.2d 652, 135 P.2d 386, to the University of Washington, an unincorporated state institution, was upheld. In that case the property, although given to an unincorporated state agency, would have been administered under the control of the corporation, the State of Washington, through the unincorporated state institution and, likewise, the bequest in question here will be administered by the agency under the laws and policies of the government. The court there said, 57 Cal. App.2d at page 654, 135 P.2d at page 388: "The testamentary provisions now before us unquestionably provide a gift for charitable purposes to a legally constituted institution. We entertain no doubt that the Legislature in enacting section 27 of the Probate Code intended to include such institutions as the University of Washington whether or not they be designated as corporations by specific legislative enactment."

The bequest to the Veterans' Administration was a bequest to the United States Government, a corporation; the government was expressly authorized by statute to take donations of property through what is now the Veterans' Administration, and the bequest is valid. It is unnecessary to discuss the further contention of the Veterans' Administration that the Government of the United States is a "state" within the meaning of said section 27.

[4] In presenting its second point, appellant challenges the court's construction of the will, stated in the conclusions as follows: "It was the intent of the testatrix to place the said remainder of the proceeds of the sale of the Ohio property in the residue of the estate and all of the bequests to the Veterans' Administration and the Burnell Institute of Spiritual Instruction were residuary in nature and not special or general bequests." It is claimed that this construction of the will was erroneous, for the reason that the bequest to it and to the Veterans' Administration was specific, as were all other bequests and the devise to Smittcamp, and that under section 750 of the Probate Code, all should have been charged proportionately with the debts and expenses of administration. Under that section, property given to residuary legatees and devisees must be appropriated for the payment of debts and expenses of administration before other property devised and bequeathed, and it is provided: "* * * but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." By section 161, Probate Code, a legacy of a particular thing, specified and distinguished from all others of the same kind, belonging to the testator, is specific; a residuary legacy embraces only that which remains after all the bequests of the will are discharged. Section 163 of the same chapter reads: "The provisions of this chapter are in all cases to be controlled by a testator's express intention." Section 101 provides that a will is to be construed according to the intention of the testator, and section 103 reads, in part: "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole," etc. The nature of the legacy in question, whether it is specific or residual, is not to be determined from the single sentence upon which appellant relies, but from the will as a whole. The intention of the testatrix, as expressed in the will, is determinative as to the nature of the legacy. Estate of Dargie, 19 Cal.App.2d 215, 222, 64 P.2d 1131.

[5] After providing for the sale of the Ohio property, paragraph Eighth gave Arthur Smittcamp the sum of $1920, and read: "* * * and the remainder thereof together with any residue of my estate that there may be I give, devise and bequeath in equal shares, share and share alike, to United States Veterans Administration and Burnell Institute of Spiritual Instruction," etc. Appellant's contention is that by the use of the words "the remainder thereof" testatrix intended to give to the Veterans' Administration and the Institute the entire proceeds of the sale of the Ohio property, less the sum of $1920 bequeathed to Arthur Smittcamp, and that the bequest was specific. The court, in looking beyond the single sentence upon which appellant relies, to other provisions of the will, would find that although the executor was directed to pay the debts, funeral expenses, expenses of last illness and of administration, no funds were designated for this purpose. The devise and the legacy to Arthur Smittcamp, the bequest to Mary Lamoreaux Burnell of the books pertaining to metaphysics and "Instruction in Truth," and the bequest of corporate stock to George H. Scott were all specific. Although the Veterans' Administration and the Institute were named as residuary legatees, all the estate was disposed of by will and there would be no residue, unless the proceeds of the sale of the Ohio property, reduced by the sum of $1920 given to Arthur Smittcamp, were intended to constitute the residue. There was but a small amount of money in bank at the time of Mrs. Hendrix' death, and under the will no sufficient funds would come to the executor with which to pay debts, expenses of administration, etc., except through the sale of the Ohio property, which would provide more than ample funds for that purpose. It would appear altogether probable, from the terms of the will, that Mrs. Hendrix wished the specific properties to go to three individuals in whom she had a special interest, undiminished by liens thereon in the amount of the debts and other obligations which she had directed to be paid. This intention was not to be defeated by her failure to specifically charge the funds that would be received from the sale of the Ohio property with the payment of the debts, etc. When effect is given to the intention of the testatrix that the shares of Arthur Smittcamp, Mary Lamoreaux Burnell and George H. Scott should go to them intact, it necessarily follows that the rights of the Veterans' Administration and the Institute were only those of residuary legatees. It was consistent with this purpose of the testatrix to construe the words "the remainder thereof," namely, the funds to be received from the Ohio administration, as meaning the sum that remained after deduction of the legacy to Arthur Smittcamp, and also the obligations of the estate which the executor was directed to pay. The several provisions of the will were brought in harmony by the construction given to them by the court. The decree, in our opinion, reflects the expressed wishes of Mrs. Hendrix.

[6] The further contention is made that the expenses of administration in California should have been charged against the estate, exclusive of that received from the sale of the Ohio property. Under sections 900, 901, and 910 of the Probate Code, the compensation of the executor and his attorney was properly computed upon the amount of the estate which was accounted for.

[7] It is also claimed that allowances for extraordinary services of the executor and his attorney should have been charged against the interests taken under the will "which occasioned said services." This was done. It appears from the report that the services for which extraordinary compensation was allowed were occasioned by the alleged uncertainties of the provisions which were brought in question by appellant. Finally, we do not find in the record a basis for the criticism that the court failed to charge against Arthur Smittcamp the expenses of maintaining the real property which was devised to him.

The decree of distribution, judgment, and orders appealed from are affirmed.

DESMOND, P. J., and WOOD, J., concur.

77 Cal.App.2d 734

PEOPLE v. QUINN et al.

Cr. 701.

District Court of Appeal, Fourth District, California.

Jan. 21, 1947.

1. Robbery ⚷9, 10

The statute defining "robbery", although requiring the taking of personal property which is in the possession of another from his person or immediate presence, does not require that this be done by the use of the hands of the person doing the taking, and where there is an intent to do so take, the distance the property is taken may be small and a slight removal is sufficient. Pen. Code, § 211.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery".

2. Robbery ⚷24(1)

Evidence that defendants, armed with a pistol, ordered victim out of his automobile and to throw his wallet on the ground, then compelling him to pick it up again to show whether it contained any money was sufficient to sustain conviction of "robbery", notwithstanding that wallet was returned when found to contain no money. Pen. Code, §§ 20, 211.

3. Robbery ⚷27(6)

In prosecution for robbery, where instruction requested by defendants did not cover matter of intent as a necessary element of the offense, but related to what is necessary to constitute an attempt to commit a crime and stated that the acts must go so far that they will result in the accomplishment of crime unless frustrated by extraneous circumstances, but there was no evidence of such extraneous circumstances, and court had given statutory definition of robbery, requested instruction was properly refused. Pen.Code, §§ 20, 211.

4. Criminal law ⚷1186(4)

In prosecution for robbery, where court had given the jury the statutory definition of robbery and had otherwise instructed that to constitute robbery there must be a felonious taking of personal property from the person of another, and it was admitted that the defendants armed with a pistol had compelled the victim to remove his wallet and throw it on the ground, failure to instruct that intent was a necessary element was not reversible error as authorizing conviction irrespective of defense that the whole affair was a practical joke. Pen.Code, §§ 20, 211; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Lloyd Frank Quinn and James William Alverson were convicted of robbery, their motions for new trial were denied, and they appeal.

Affirmed.

Edgar G. Langford, of San Diego, for appellants.

Robert W. Kenny, Atty. Gen. and Henry A. Dietz, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with the crime of robbery in that on April 23, 1946, they willfully, unlawfully, and feloniously took a wallet from one James Van Wagner, under the circumstances named in the statute. A jury found them guilty and they have appealed from the judgments and from the order denying their motions for a new trial.

There is little, if any, dispute as to the material facts. Van Wagner was a student in the San Diego State College. About 9:00 or 9:30 P. M. on April 23, 1946, he drove into Balboa Park in a Plymouth automobile, accompanied by a girl friend. While they were parked on a side street, some two or three blocks from the main entrance to the park, the appellants approached the car. Alverson pointed a pistol at Van Wagner and ordered him to get out of the car with his hands up. When he complied he was ordered by both Alverson and Quinn to step back. Alverson then told Van Wagner to throw his wallet on the ground. Van Wagner took his wallet out of his pocket and threw it on the ground, a distance of about six feet. Alverson then said "I will mail it back to you." Van Wagner replied that this would not be necessary as there wasn't any money in it. He was then told to pick up the wallet and show it to Alverson. When he took a step toward Alverson he was again told by both Alverson and Quinn to step back. He stepped back, opened the wallet and showed the appellants that there was nothing in it. Alverson then said "What about your girl friend, does she have any money?" Van Wagner replied "No" and Alverson then said: "All right. Get in that car and get out of here." Van Wagner then drove away and notified the police. The appellants walked out of the park and some five or six blocks toward the downtown section of San Diego, where they were taken into custody by the officers. At that time Alverson had a fully loaded pistol and five extra cartridges in his pockets.

Alverson had been released from Preston during the preceding February, and Quinn had previously been convicted of burglary. Van Wagner had never known either of the appellants. Alverson did not personally know Van Wagner but on several occasions had seen him entering or working with a Plymouth car across the street from Alverson's home. Alverson testified that his reason for having the gun was that he was taking downtown to sell it. He also claimed that it was not loaded during the robbery, but that he and Quinn loaded it as they were walking away from the park. Alverson admitted that he had done all of the things testified to by Van Wagner and Quinn admitted on the stand that he had fully participated therein. They testified that they had accidently met near this entrance to the park and that they walked around searching for an address that had been given to Quinn by a girl. They were unable to locate the address and Alverson testified that he then noticed Van Wagner's car over in the park and decided to play a joke on him, and that he "was going to tell him about it the next day."

[1, 2] The appellants' first contention is that the evidence is insufficient to sustain the verdicts in that it fails to show a taking and asportation of property which is sufficient to constitute the crime of robbery. Reliance is placed on the reference to manual possession in People v. Beal, 3 Cal.App.2d 251, 39 P.2d 504, and People v. Clark, 70 Cal.App.2d 132, 160 P.2d 553. In the first of these cases it was said [3 Cal.App.2d 251, 39 P.2d 505] "The crime of robbery is complete when the robbers without lawful authority and by means of force or fear obtain possession of the personal property of another in the presence of its lawful custodian and reduce it to their manual possession." That language was applicable to the facts in those cases but it was not intended to establish a fixed rule of law that the crime of robbery could not be complete unless the property in question was actually taken into the hands of the robber. Section 211 of the Penal Code defines robbery as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." This requires the taking of personal property which is in the possession of another from his person or immediate presence but does not require that this be done by the use of the hands of the person doing the taking. Where there is an intent to so take the property while some asportation is required it is well settled that the distance it is taken may be very small. People v. Clark, 70 Cal.App.2d 132, 160 P.2d 553. A very slight removal is sufficient. Driggers v. State, 96 Fla. 232, 118 So. 20. It would be a strained and unreasonable construction of the language of the statute to interpret it as necessarily requiring the taking of the stolen property into the hands of the one committing the robbery. The property taken might be a horse or a cow forcibly taken from the immediate presence and possession of the victim. It would be possible to feloniously take such property from the possession and immediate presence of the victim, but it would be obviously impossible to take such property into the hands. A taking of possession away from the victim and into the control of the taker is sufficient. In the instant case, there was admittedly an intentional removal of this wallet from the possession of its owner, accomplished by fear of a gun in the hands of one of the

appellants, and a removal of the property for some six feet. That the property was thereafter returned when it was found to contain no money is not a material factor. There is nothing in the statute that requires any more in the way of a taking or asportation than here appears and the evidence is sufficient in the respect complained of.

It is next contended that the court erred in giving the following instruction: "You are instructed that if the jury believe beyond a reasonable doubt that at the order of the defendant Alverson, and motivated by that order and fear of the consequences if he should refuse, and against his will, Mr. Van Wagner threw his billfold on the ground, this would sufficiently establish a taking of personal property in the possession of Mr. Van Wagner, from his person or immediate presence, and against his will, accomplished by means of fear."

It is argued that this instruction omits the element of an intent to steal; that it was prejudicial in that it deprived appellants of the only defense they offered, to wit, that the whole affair was a practical joke; and that this instruction authorized the jury to convict the appellants irrespective of whether they intended to steal the wallet and irrespective of whether or not they had reduced it to their manual possession.

[3] In the closing brief it is argued that no instruction was given to the effect that intent was a necessary element of the crime charged, and while it is admitted that the appellants did not ask for an instruction to the effect set out in section 20 of the Penal Code, it is argued that another instruction offered by the appellants and refused by the court covered that ground. With respect to the latter point, the refused instruction did not cover that ground at all but related to what is necessary to constitute an attempt to commit a crime and stated that the acts must go so far that they will result in the accomplishment of the crime unless frustrated by extraneous circumstances. No attempt to commit a crime was here charged, there was no evidence of extraneous circumstances which frustrated the completion of the crime, and the offered instruction was properly refused.

[4] The criticised instruction was not a formula instruction and purported merely to cover the element of taking and asportation. The phrase "at the order of the defendant Alverson" infers an intentional order and could not well be construed otherwise. Immediately preceding the giving of that instruction the court had given the statutory definition of robbery in the language of the statutes. This is usually held sufficient. People v. White, 5 Cal.App. 329, 90 P. 471; People v. Castile, 3 Cal.App. 485, 86 P. 745. While the question of intent was one of fact for the jury (People v. Post, 76 Cal.App.2d 511, 173 P.2d 48) there was really no factual issue here in that regard as the appellants admitted that they had committed all of the acts exactly as testified to by the victim, and that they intentionally forced him to part with the possession of his wallet. While Alverson testified that he had another secret purpose in mind he admitted doing the acts in question, and the only inference possible from his own testimony is that he intended to perform these acts. The intent to do the act was admitted. Without conceding that the defense offered, that the acts were performed for the purpose of playing a practical joke, would be a valid defense, that defense was not taken from the jury by the instruction complained of. The jury was otherwise instructed that to constitute robbery there must be a felonious taking of personal property from the person of another, and that instruction necessarily included the question of intent.

While it may be conceded that an instruction should have been given to the effect that in constituting a crime there must exist a union or joint operation of act and intent, it cannot be held that any possible error was sufficiently prejudicial to justify a reversal in view of the provisions of section 4½ of article VI of the Constitution. The intention of the parties to perform the acts in question clearly appeared even from their own evidence. Aside from admitting the acts in question Alverson testified that when arrested he told the police certain things, half of which were true, but that "I did not mention anything about the robbery"; and Quinn, when he was talking about other matters on three separate occasions stated that they occurred "after the holdup". A reading of the story told by the appellants on the witness stand clearly discloses why the jury refused to believe it, and it is unthinkable that the result in this case could have been affected by the failure to give any other instruction on the question of intent.

The judgments and order are affirmed.

MARKS and GRIFFIN, JJ., concur.

77 Cal.App..2d 818

EFINOFF v. SHEPHARD et al.

No. 13138.

District Court of Appeal, First District,

Division 1, California.

Jan. 29, 1947.

1. New trial 🔑**70**

Trial court has wide discretion in granting a new trial on ground of insufficiency of evidence.

2. Appeal and error 🔑**979(2)**

Trial court's ruling, granting or refusing new trial, will not be disturbed by appellate court, especially where new trial was granted for insufficiency of evidence to sustain jury's verdict, in absence of clear, affirmative showing of gross, manifest or unmistakable abuse of discretion.

3. New trial 🔑**70**

On motion for new trial because of insufficiency of evidence to sustain jury's verdict, trial court must scrutinize and weigh evidence, and new trial should be granted, if court believes that facts on which jury's decision is based are insufficient to justify it, or that weight of evidence is against it, though court may draw inferences opposed to those of jury.

4. Appeal and error 🔑**1015(1)**

An order granting new trial for insufficiency of evidence to sustain jury's verdict will not be set aside on appeal, if reasonable or fairly debatable justification therefor appears or reasonable minds might differ in their deductions from evidence, though appellate court might take different view than trial court or believe evidence sufficient to support judgment if new trial were denied.

5. New trial 🔑**71**

In action for death of plaintiff's husband arising from alleged negligent operation of an automobile by defendants record did not indicate that trial court abused its discretion in granting plaintiff's motion for a new trial after verdict for defendants, where evidence was conflicting.

6. Appeal and error 🔑**1015(1)**

Action of trial court in granting a new trial could not be disturbed because of statement by trial court on denial of defendants' motion for directed verdict that there was sufficient evidence to justify case being passed upon by the jury and that there was sufficient evidence to justify a decision for plaintiff or defendants.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Dorothy Efinoff against Harry B. Shephard and another for wrongful death of plaintiff's husband arising from alleged negligent operation of an automobile by defendants. From an order granting plaintiff's motion for a new trial after verdict for defendants, defendants appeal.

Affirmed.

Albert Picard, of San Francisco, for appellants.

Joseph A. Brown, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal by defendants from an order granting plaintiff's motion for a new trial after a verdict by the jury in favor of defendants. The action is one for damages for the wrongful death of plaintiff's husband arising from the alleged negligent operation of an automobile by defendants.

[1-4] Appellants have filed an opening brief consisting of three pages and have filed no closing brief. The sole contention of appellants is that the trial court abused its discretion in granting respondent a new trial upon the ground of the insufficiency of the evidence. It is a well settled rule of law that a trial court has a wide discretion in granting a new trial on the ground of insufficiency of the evidence. The trial judge is said to be in the position of a "thirteenth juror," with full power to weigh the evidence and to reach his own conclusion as to the probative value thereof. As was said in Ogando v. Carquinez Grammar School Dist., 24 Cal.App.2d 567, at page 569, 75 P.2d 641, at page 642: "Defendants' second and final contention is that in any event the evidence would be insufficient as a matter of law to sustain a verdict in plaintiff's favor, and that therefore the trial court erred in granting a new trial. There is no merit in the contention. The granting of or refusal to grant a new trial rests very largely within the discretion of the trial court—a discretion which is extremely wide; and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest, or unmistakable abuse of the discretion it is called upon to exercise. 20 Cal.Jur., pp. 27–31. In other words, it is only in rare instances and on very strong grounds that the reviewing court will set aside an order granting a new trial. Morgan v. Los Angeles Pac. Co., 13 Cal.App. 12, 108 P. 735. Furthermore, as frequently pointed out in the decisions, in considering such a motion it is not only the trial court's province but its duty to scrutinize and to weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury. 20 Cal. Jur., pp. 26, 27. If, therefore, on appeal the case shows a reasonable or fairly debatable justification for the trial court's order, or the evidence presents a situation where reasonable minds might differ in their deductions, said order will not be set aside, even though the court of appellate jurisdiction might take a view different from that of the trial court (Kramm v. Stockton Electric R. Co., 10 Cal.App. 271, 101 P. 914; Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951), or believe the evidence would be sufficient to support a judgment in the event a new trial had been denied. (Glascock v. Watters, 136 Cal.App. 713, 29 P.2d 434.)"

[5] An examination of the record in the instant case shows that the evidence was conflicting, and that under the rules announced in the above case it was clearly within the power of the trial court to grant the motion for a new trial.

[6] In support of their argument that the trial court abused its discretion in granting the motion for a new trial, appellants quote the following statement made by the court in denying appellant's motion for a directed verdict: "The motion will be denied. I think there is sufficient evidence to justify the case being passed upon by the jury. There is sufficient evidence to justify a decision for the plaintiff or the defendant." Appellants do not contend that the evidence in the case was not conflicting, but argue that because of the quoted statement the trial court abused its discretion in granting respondent's motion for a new trial. No authorities are or could be cited in support of this contention, as it is utterly devoid of merit. This same contention was disposed of in the case of Hunt v. Pacific Electric Ry. Co., 51 Cal.App.2d 11, at page 13, 124 P.2d 89, at page 90, where the court said: "Appellants in their brief contend that there was an abuse of discretion on the part of the trial judge, and quote at some length from his remarks made at the time of passing upon the motion for judgment notwithstanding the verdict, in which he is quoted as saying, among other things, that 'I feel the matter submitted to the jury and all of those matters were properly submitted to the jury and that there was evidence sufficient to serve as a finding for the verdict which has been just returned by the jury.' Whatever may have been the remarks or the views of the court on that occasion, he subsequently conducted a hearing upon

the motion for new trial and became convinced that the motion should be granted. This action cannot now be impeached by any remarks made previously by the court during progress of the trial."

The order granting the motion for a new trial is affirmed.

PETERS, P. J., and WARD, J., concur.

77 Cal.App.2d 678

PEOPLE v. CANNON.

Cr. 3988.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1947.

Rehearing Denied Jan. 29, 1947.

1. Criminal law 🔑1159(4)

The appellate court should not interfere with jury's verdict of conviction and judgment thereon on ground that prosecuting witness' testimony was so inherently improbable as to be unbelievable, unless such testimony was so obviously and inherently improbable as to leave court no recourse, without self-stultification, except to reverse judgment.

2. Criminal law 🔑1159(4)

Contradictions and inconsistencies in prosecuting witness' testimony or disclosures of unusual circumstances thereby do not alone render such testimony so inherently improbable as to justify appellate court in reversing jury's verdict of conviction and judgment thereon.

3. Criminal law 🔑260(11)

The inferences to be drawn from probative facts, though undisputed, are within exclusive province of trial court, whose function is as much to resolve conflicts between opposing inferences as between contradictory statements of fact, and such court's determination thereof, if supported by any substantial evidence, is binding on appeal.

4. Criminal law 🔑1159(2, 4)

Questions as to witnesses' credibility and weight of their testimony are for trier of facts.

5. Criminal law 🔑553

The jury has right and duty to determine to what extent they believe or disbelieve testimony, though impeached by evidence in nature of contradictions or otherwise.

6. Criminal law 🔑553

The jury may give credence to a witness who has testified falsely in part or whose testimony contains contradictions or inconsistencies.

7. Criminal law 🔑260(11)

An appellate court is not concerned with preponderance of evidence, but only with question whether record contains substantial evidence tending to support trial court's fact findings.

8. Embezzlement 🔑44(1)

Evidence warranted conviction of grand theft. Pen.Code, § 484.

9. Embezzlement 🔑1
False pretenses 🔑20
Larceny 🔑1

A defendant may be convicted of grand theft on proof of larceny, embezzlement, or obtaining of money by false pretenses. Pen.Code, § 484.

10. Embezzlement 🔑4

The essential elements of "embezzlement" are that accused was prosecuting witness' agent or bailee in holding embezzled property, that property belonged to such witness, that it was lawfully in accused's possession at time of embezzlement, that he was guilty of conversion denounced by statute, and that he intended to deprive prosecuting witness of property unlawfully. Pen.Code, § 503.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

11. Bailment 🔑13

A "loan for use" is a bailment for bailee's benefit. Civ.Code, §§ 1884, 1885.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan for Use".

12. Embezzlement 🔑44(5)

Evidence established bailment for use, rather than sales, of municipal bearer bonds, delivered by owner to his attorney for temporary use as collateral security for bank loans of money to attorney, so as to warrant his conviction of grand theft by embezzlement of surplus proceeds of bank's sales of bonds for satisfaction of loans. Pen.Code, §§ 484, 503, 507; Civ. Code, §§ 1884, 1885.

13. Embezzlement 🔑8

An attorney, charged with grand theft by embezzlement of surplus proceeds of banks' sales of municipal bearer bonds, delivered to defendant by client for use as collateral security for banks' loans to defendant, could not question client's ownership of bonds on ground that title thereto passed to defendant on such delivery, but title remained vested in client as against attorney as bailee for use. Pen.Code, §§ 484, 503, 507; Civ.Code, §§ 1884, 1885.

14. Embezzlement 🔑9

An attorney, depositing municipal bearer bonds, owned by his client, with banks as security for loans to attorney, as authorized by client, was lawfully in constructive possession thereof at times of banks' sales of bonds, pursuant to attorney's orders, for satisfaction of loans, so as to warrant attorney's conviction of grand theft by embezzlement of surplus proceeds of such sales. Pen.Code, §§ 484, 503, 507; Civ.Code, §§ 1884, 1885.

15. Criminal law 🔑22

The motive with which offense is committed is immaterial.

16. Embezzlement 🔑44(6)

In prosecution for grand theft by embezzlement of surplus proceeds of banks' sales of municipal bearer bonds for satisfaction of loans, as security for which defendant deposited bonds with banks, as authorized by owner thereof, evidence justified finding that defendant appropriated such proceeds for his own use and for purposes not in due and lawful execution of his trust as bailee of bonds for use. Pen.Code, §§ 484, 503, 507; Civ.Code, §§ 1884, 1885.

17. Embezzlement 🔑44(2)

In prosecution for grand theft by embezzlement of surplus proceeds of banks' sales of municipal bearer bonds, pursuant to defendant's orders, for satisfaction of loans, as security for which he deposited bonds with banks, as authorized by owner, evidence justified trial court's conclusion that defendant was actuated by fraudulent intent to deprive owner of his property unlawfully. Pen.Code, §§ 484, 503, 507; Civ. Code, §§ 1884, 1885.

18. Larceny 🔑1

The essential elements of "larceny" are taking of thing from owner's possession without owner's consent, asportation thereof, its ownership by another than thief, and his intent to deprive owner of property wholly and permanently without claim of right or justification. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

19. Criminal law 🔑554

The trier of facts may disregard entirely defendant's exculpatory testimony found unworthy of belief.

20. Criminal law 🔑260(11)

On appeal from conviction of grand theft, appellate court is bound by trial court's implied finding resolving conflicts in evidence against defendant. Pen.Code, § 484.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Charles W. Cannon was convicted of grand theft, and he appeals.

Affirmed.

A. C. Ackerson, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

By indictment the grand jury of the county of Los Angeles accused defendant of the commission of seven counts of grand theft, a felony. Following a trial by the court, a jury trial having been waived, a judgment of guilty was rendered as to each count. A subsequent motion for a new trial was denied and the defendant was sentenced, counts II and III to run concurrently with the sentence as to count I, and counts V, VI and VII to run concurrently with the sentence as to count IV. The sentence as to the latter count was ordered to run consecutively with that as to count I. From the judgment and order denying defendant's motion for a new trial the defendant appeals.

It is urged that the evidence in this case is insufficient to sustain a conviction under any count of the indictment and that the trial court erred as a matter of law in arriving at such decision.

The evidence relied upon by the prosecution as being most favorable in support of the judgment is that Ralph Goeller, the complaining witness, became acquainted with defendant about 1933 while they were working in the same branch of a local bank. Defendant was the branch manager, studied law during that period and was admitted to practice in California. When Goeller's father died in 1938 he engaged defendant as his attorney to represent him in the matter of his father's estate. In connection with the probate of such estate and with his personal affairs Goeller, on September 27, 1939, signed an authorization card permitting defendant as his agent to enter his safe deposit box. When he visited Honolulu in 1940, defendant was furnished with a duplicate key to the box so that if needed defendant could clip coupons from the bonds therein or cash a bond if requested so to do and forward its proceeds. Defendant retained this key until January 30, 1945, when his authority to enter the box was withdrawn. Defendant was never given permission to enter the box alone excepting when Goeller was out of town and then only by specific direction, and at no time did Goeller authorize defendant to go alone to the box and remove any bonds therefrom. Defendant was paid for his legal services rendered in behalf of the estate by cash and at no time received any bonds in payment of attorney's fees.

During the probate period defendant informed Goeller that, by way of fees for legal work, he had obtained control of Filters, Inc., a corporation which manufactured air filters, which company had great prospects but was short of funds. On several occasions he solicited Goeller to invest money in this company and although the latter refused to do so he agreed to lend defendant some bonds which he could use solely as collateral security for a personal indebtedness which defendant would incur in obtaining money for his own further investment in the company. Such bonds were never to be sold by defendant as they were all tax exempt municipal bonds which Goeller had inherited from his father. Defendant was further told that he was not to borrow so much money on the bonds as to cause them to be foreclosed and that he was to return them to Goeller when the company got "squared around." During the period that the bonds were being used as collateral security by the defendant, Goeller was to receive the income from the bond coupons but was not to receive any interest from defendant for the loan of the bonds, although the latter assured him that if the filter company made a profit he would benefit therefrom.

During the period between September, 1940 and December, 1942, Goeller loaned defendant bonds worth a total of $50,000 to be used only under the conditions above set forth. On each occasion when such bonds were delivered to defendant Goeller personally withdrew them from his safe deposit box, defendant sometimes being present. On such occasions defendant gave Goeller a signed receipt stating that such bonds were to be used as collateral security for his personal loans. During the period from September 5, 1940, to December 1, 1942, $24,000 of such bonds referred to in count VI of the indictment were deposited with a bank as collateral security for defendant's loans totaling $24,500. On December 30, 1942, without Goeller's knowledge or consent, defendant ordered the bank to sell such bonds and they were sold on the following day for $30,118.96. After payment of the moneys due the bank for loans and interest the balance of the sales price of $5,230.97 was deposited to the credit of defendant in his personal bank account in such bank.

On June 24, 1942, defendant deposited with a bank as security for $6,000 in personal loans to him, bonds owned by Goeller of a par value of $5,000, which are referred to in count IV of the indictment. On August 26, 1942, without Goeller's knowledge or consent, defendant ordered the bank to sell such bonds. They were sold on or about that day from which sufficient moneys were received to pay off this loan, with interest, leaving a balance in excess of $624.41, which sum was delivered to defendant.

Between September 14, 1942, and October 31, 1942, defendant borrowed $20,000 from the bank as security for which he deposited $16,000 of Goeller's bonds, as referred to in count VII of the indictment. On January 14, 1943, without Goeller's knowledge or consent, defendant ordered the bank to sell such bonds, and $20,132.18 was received by their sale. After the loan and interest was repaid the bank the balance remaining from the sales price of $3,432.18 was deposited in defendant's personal bank account in such bank.

On December 22, 1942, defendant deposited with a bank $5,000 of such bonds as security for loans advanced to him totaling $6,000, referred to in count V of the indictment. On February 23, 1943, without Goeller's knowledge or consent, defendant ordered the bank to sell such bonds. They were sold on the following day for $6,515.60, and after deducting the amount of the loans, with interest, the remaining balance of $562.89 was deposited to defendant's credit in his personal bank account in such bank.

On October 30, 1942, defendant gave Goeller a consolidated receipt covering all bonds delivered to him to that date, which receipt specified that they "are to be used as collateral to my personal indebtedness." On June 14, 1943, defendant sent Goeller a letter advising him that because of reasons concerning his health it would be necessary for him to leave town for a while. He expressed appreciation of the assistance which Goeller had given him and his efforts to build up the filter company, and in order to secure him for his financial help he, by such letter, transferred, assigned and set over to Goeller all his right, title and interest in and to the filter company stock which had been issued to him, amounting to 89% of the outstanding stock. He further stated that he would endorse the stock certificates and give notice of assignment to the secretary of the company. He requested the signature of Goeller to a copy of the letter, including an irrevocable proxy, coupled with an interest to defendant, whereby the latter was to have full control and discretion as to the manner in which the stock was to be thereafter voted. The copy of the letter was signed and returned by Goeller, the notation as to the assignment of the stock interest was made by defendant on the books of the company but the certificates themselves were never delivered to Goeller.

About April 7, 1944, Goeller returned from a trip out of the state. He was ill and his doctor advised him that he must go to bed. He then went to his safe deposit box, entered it with his own key, checked all of the 42 $1,000 bonds which remained therein and clipped the coupons therefrom payable to October 1, 1944. He thereupon went to bed and remained there for some days thereafter. A day or two after April 7, 1944, defendant called upon Goeller at his home and visited him in his bedroom. Goeller's key to his safe deposit box was in a dresser drawer in this bedroom but such key was not given to defendant. Goeller told defendant that he would not lend him any more bonds as he had over half of them.

On April 10, 1944, defendant entered Goeller's safe deposit box and took therefrom $12,000 in bonds and deposited them in a bank as collateral security for a personal loan to him. On April 14th, defendant again entered such box, removing $6,000 in bonds therefrom, which were posted as security for another loan by the same bank, the total of the two loans being $20,000. These bonds are referred to in count I of the indictment. On May 18, 1944, defendant ordered the bank to sell such bonds and $20,781.68 was realized therefrom. After deducting the amount of the loans and interest a balance remaining from such sale price of $674.51 was deposited to defendant's personal account in such bank.

On April 17, 1944, Goeller asked his wife to go to his safe deposit box and get the certificate to an automobile which he desired to sell. They searched for their key to the box and found it to be missing. Mrs. Goeller telephoned defendant for the purpose of borrowing the other key which was in his possession. Defendant met her and gave her a key, telling her to tell Goeller not to change the box because the other key might be found. Defendant had both keys to the box in his possession at this time but did not so advise Mrs. Goeller, and her husband believed that the one which he received from defendant and retained was the only key then in the latter's possession.

On July 18, 1944, defendant again entered Goeller's safe deposit box and removed $7,000 in bonds which are described in count II of the indictment. On the same day defendant deposited such bonds with a bank with instructions to sell the same. They were sold on the following day for $8,433, all of which was deposited in a new bank account opened by defendant with such bank.

On September 15, 1944, defendant again entered such box removing $3,000 in bonds, which are referred to in count III of the indictment. On the following day these bonds were deposited as collateral security for loans made by a bank to defendant in the sum of $3,100. Defendant thereupon got married and left the city on a honeymoon.

On October 5, 1944, Goeller sent his wife to the safe deposit box, which was the first visit either of them had made to the box since April 17, 1944. Only 14 bonds remained in the box. Goeller attempted to contact defendant but found him to be out of the city by reason of his marriage, and upon the latter's return on October 10, 1944, he called upon Goeller. In response to the question as to what had happened to the bonds which had been taken from the box since April 7, 1944, defendant said he had taken such bonds because the company had another big order for filters and he needed the money right away, and as he had noticed that Goeller had clipped the coupons up to October he thought he could use the bonds and put them back in the box before Goellor went to get them on October 1, 1944.

On January 21, 1945, Goellor prepared a written receipt for the 28 bonds which were missing from the box and defendant signed it with the notation "the above bonds are held by the undersigned as collateral to loans of Filters, Inc., and are in addition to other bonds on which receipts have been previously given. C. W. Cannon." The bonds described in counts I, II and III of the indictment made up the itemized list in such receipt. Goeller then asked defendant if it were not possible that some of the bonds had been sold or that a bank had collected by foreclosure on them and defendant denied any such sale or forclosure, stating that they were all held by one bank as collateral on notes.

Goeller then employed an attorney to investigate defendant's dealings concerning such bonds. On January 25, 1945, defendant told such attorney that he would furnish a financial statement of the assets and liabilities of the filter company. Defendant was then asked if he had sold any of the Goeller bonds and he replied that he had. When asked how many of such bonds had been sold defendant stated that he would have to examine his records in order to give a complete report. A full statement as to which bonds were sold, to whom, and the amount received, was demanded. Two days later defendant called at the attorney's office and failed to present a statement covering the sale of the bonds, but in response to a question then stated that all of the bonds had been sold. Only a meager handwritten financial statement as to the affairs of the filter company was ever delivered by defendant. On March 7, 1945, after repeated demands, defendant delivered to such attorney a statement covering the sale of the Goeller bonds.

For those bonds covered by counts IV to VII, inclusive, of the indictment, defendant, over all of the period from the time of receiving such bonds to January of 1945, continued to pay Goeller a sum equivalent to the interest coupons maturing on such bonds. During this period two or three of such bonds matured and defendant paid Goeller the principal amounts thereof. None of Goeller's bonds were ever foreclosed upon by any creditor holding them as security for loans to defendant, nor has Goeller ever received a return of any of such bonds or the value thereof, other than those few which matured during the interval.

During the entire period of these transactions defendant told Goeller the filter company was making money and was growing so fast that it took all of the money the company got from its contracts to buy material for the next contracts. He also told Goeller of many deals which were pending to sell the company for a profit, but none ever materialized. Defendant testified that the filter company had lost money in the years 1940-1943, inclusive, and had made a book profit only in 1944.

[1, 2] The defendant urges on this appeal that the testimony of the complaining witness, Ralph Goeller, was unbelievable and inherently improbable and that certain elements essential to the commission of the crimes charged were here lacking. He readily concedes that the evidence presented by the record herein is highly conflicting in many instances but insists that the judgment should be reversed on all counts upon the ground that Goeller's testimony relating to the circumstances under which he claimed the thefts were committed is so inherently improbable as to show he is unworthy of belief. This contention cannot be sustained. "Unless the appellate court can say that the testimony is so obviously and inherently improbable as to leave the court no recourse without self-stultification, except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment of the trial court upon that ground. People v. Antunez, 28 Cal.App. 740, 153 P. 963; People v. Becker, 140 Cal.App. 162, 35 P.2d 196. Such improbability must 'plainly appear before the reviewing court should assume the functions of the trial jury.' People v. Antunez, supra (page 964). 'Contradictions and inconsistencies in the testimony of a witness alone will not construe inherent improbability' (People v. Amadio, 25 Cal.App. 729, 145 P. 151, 152), and 'it is not sufficient that the testimony may disclose circumstances which are unusual' (People v. Collier, 111 Cal.App. 215, 226, 295 P. 898, 902)." People v. Moreno, 1938, 26 Cal.App.2d 334, 336, 79 P.2d 390, 392. See also, People v. Johnson, 1941, 46 Cal.App.2d 63, 66, 115 P.2d 605; People v. Santora, 1942, 51 Cal.App.2d 707, 711, 125 P.2d 606. Applying these rules to the instant case we are unable to agree with defendant that Goeller's testimony is so inherently improbable as to require an interference with the judgment of the trial court upon that ground.

[3-8] Without attempting to cover all of the evidence conflicting with that heretofore related, defendant particularly relies upon testimony which he claims shows that all moneys derived by him from the use of the bonds as collateral or from their ultimate sale was turned over to and used by Filters, Inc., that Goeller had full knowledge of the operations and financial condition of such company at all of the times in question; that under date of January 2, 1943, defendant by letter advised Goeller of the sale of the bonds described in counts IV, V, VI, and VII; that Goeller knew defendant was personally paying a substantial income tax for him for the year 1943, thus showing knowledge of and authorization to sell the bonds which gave rise to the increased income thus accounted for; that the bonds were borrowed for a legal purpose and used exactly as proposed and therefore no fiduciary relationship was violated by defendant. All of the evidence as to these matters was either directly or indirectly refuted by prosecution testimony which the trial judge was entitled to weigh and determine. Even where the probative facts are undisputed the question as to the inferences to be drawn therefrom is still within the exclusive province of the trial court, it being as much the function of such court to resolve a conflict between opposing inferences as it is to resolve a conflict between contradictory statements of fact, and

such a determination, if supported by any substantial evidence, is binding on appeal. Tobola v. Wholey, 1946, 75 Cal.App.2d 351, 170 P.2d 952; Mah See v. North American Acc. Ins. Co., 1923, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123. "Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of the facts. As said in Turner v. Whittel, 2 Cal.App.2d 585. 588, 38 P.2d 835, 836: '* * * Although impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony. Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St.Rep. 131; Secondo v. Secondo, 218 Cal. 453, 23 P.2d 752. They may likewise give credence to a witness who has falsely testified in part (Robinson v. Robinson, 159 Cal. 203, 113 P. 155), or whose testimony contains contradictions or inconsistencies. Bitsekas v. Parechanian, 67 Cal.App. 148, 226 P. 974. An appellate court is not concerned with the question of the preponderance of the evidence but with the single inquiry whether the record contains substantial evidence tending to support the findings assailed. Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745; Johnson v. Risdon, 89 Cal.App. 768, 265 P. 505.'" Hansen v. Bear Film Company, Inc., 1946, 28 Cal.2d 154, 184, 168 P.2d 946, 964. The evidence herein, when believed by the trial judge, is of sufficient substantiality to warrant a conviction, and under such circumstances an appellate court is precluded from reversing the judgment on the ground of its insufficiency.

With reference to defendant's contention that the evidence fails to establish certain elements material to the crime of grand theft, he directs our particular attention to a lack of proof of an intent to steal, of the agency relationship, of any fraudulent intent and any appropriation or conversion to defendant's own use.

[9] Since the amendment in 1927 to section 484 of the Penal Code a defendant may be convicted of grand theft upon proof showing either larceny, embezzlement or obtaining money by false pretenses. People v. Cook, 1935, 10 Cal.App.2d 54, 57, 51 P.2d 169; People v. Jones, 1943, 61 Cal.App.2d 608, 622, 143 P.2d 726. Those offenses charged in the indictment under counts IV to VII, inclusive, fall under the classification of embezzlement, while those enumerated I to III, inclusive, must be considered in the category of larceny.

[10, 11] "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted." Pen.Code, sec. 503. The essential elements of the crime of embezzlement are set forth in People v. Borchers, 1926, 199 Cal. 52, 56, 247 P. 1084, 1085, as follows: "In order to sustain a conviction upon such a charge it must at least be shown, first, that the accused was the agent or bailee of the prosecuting witness in holding the alleged embezzled property; second, the property must actually belong to the alleged principal, the prosecuting witness; third, it must be lawfully in the possession of the accused at the time of the alleged embezzlement; fourth, the accused must have been guilty of the conversion which the statute denounces; and, fifth, there must be shown an intent on the part of the accused to deprive the prosecuting witness of his property unlawfully. See 20 C.J. 413, and following pages." As to the first required element concerning the defendant being the agent or bailee of Goeller in holding the bonds in question, Penal Code, section 507, provides: "Every person entrusted with any property as bailee * * * or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement." A loan for use is defined by section 1884, Civil Code, as "a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use." Section 1885 says: "A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender." A loan for use is a bailment for the benefit of the bailee. 4 Cal.Jur. 9.

[12] Under evidence herein which the trial judge was entitled to believe, a bailor-bailee relationship was established as to the bonds described in counts IV to VII in that they were delivered by Goeller to defendant, his friend and attorney, for the latter's use as collateral security for a personal indebtedness for a temporary period only until such time as Filters, Inc., got "squared around." Such bonds were to be returned to the owner at that time without any reward for their use and were never to be sold by defendant. The fact that the income from the bond coupons, as well as the principal of those bonds falling due, was reserved by and paid to Goeller, is further evidence that title to such bonds never left him and the transactions between them constituted bailments for use rather than sales. See People v. Baker, 1923, 64 Cal.App. 336, 342, 221 P. 654; People v. Harby, 1942, 51 Cal.App.2d 759, 771, 125 P.2d 874.

[13] Defendant contends that the record fails to disclose ownership in Goeller of the bonds which he is charged with embezzling in that, by delivering these bearer bonds to him, title must have passed as this was necessary in order that he might post them as his own for collateral security. While the banks with which defendant dealt in posting and selling these bonds might readily raise this estoppel against Goeller, defendant, under the evidence herein, is in no position to question his principal's ownership. People v. Riordan, 1926, 79 Cal.App. 488, 493, 250 P. 980; People v. Stafford, 1927, 81 Cal.App. 159, 161, 253 P. 183. As a contract of bailment for use the title to and ownership of the bonds so bailed to defendant remained vested in the bailor as against the bailee.

[14] The third necessary requirement to the sustaining of an embezzlement conviction, that the property is lawfully in the possession of the accused at the time of the commission of such crime, is fully met by the evidence. Up to the time of the sale of such bonds by defendant, he had done with them exactly what he agreed with the owner to do. Although after the bonds were posted with the banks the defendant was not in actual physical possession of them, he still retained control over their disposition and therefore was in constructive possession. People v. Tambara, 1923, 192 Cal. 236, 240, 219 P. 745.

[15, 16] The fourth element of embezzlement, that the accused must have been guilty of the unlawful conversion, is likewise fully established by the evidence. It is conceded by the defendant that he sold all of the bonds described in counts IV to VII. We are bound by the implied finding of the trial court that they were sold contrary to the express agreement with the owner that they were never to be sold but should be returned to him at a future time. The court would have been justified in believing, from the evidence of successive sales, that when defendant borrowed the bonds, upon a promise to return them, he intended to sell them and to keep the sums that remained after his loans were paid off. Defendant contends, however, that the court is precluded from finding that he converted the property to his own use by reason of the fact that the proceeds of the sale thereof were used in furthering the operations of the filter company, an interest in which had been assigned to Goeller, and that as a consequence the bonds were used exactly as proposed. This argument is entirely refuted by the implied finding of the court that any sale whatsoever of the bonds was contrary to the authority given him by the owner. Furthermore, the trial judge may well have inferred, from the evidence showing substantial sums from the sale of such bonds to have been deposited in defendant's personal bank accounts, that all of the proceeds accruing from the sales did not find their way into the company in question but were otherwise used by the defendant. The motive with which the offense is committed is immaterial. 29 C.J.S., Embezzlement, § 12, p. 688. The money from the sale of the bonds was applied to the use of the defendant when he used it in the way he chose. Whether he elected to use it on his personal obligations or give it to the filter company, he nevertheless directed its disposition and thereby applied it to his own use. State of Kansas v. Pratt, 1923, 114 Kan. 660, 220 P. 505, 34 A.L.R. 189. From the evidence herein the

trial court was justified in finding that defendant had appropriated such moneys for his own use and for purposes not in the due and lawful execution of his trust. See People v. Schroeder, 1919, 43 Cal.App. 623, 626, 185 P. 507.

[17] As to the fifth element, an intent on the part of the accused to unlawfully deprive the owner of his property, from all of the evidence, including that showing that the bonds in question were sold by defendant in 1942 and 1943; that he did not tell Goeller of such sales but in fact after at least part of such bonds had already been sold he gave him a written receipt showing them to be held by him for use as collateral for his personal indebtedness; he told Goeller in 1945 that none had been sold but all were being held in a bank as collateral security for his loans; that the proceeds of such sales were in fact used to pay off his own indebtednesses with the balance deposited in his personal bank accounts, the court was justified in concluding that the defendant was actuated by such a fraudulent intent. See People v. Larson, 1928, 92 Cal.App. 376, 384, 268 P. 419; People v. Hill, 1934, 2 Cal.App.2d 141, 157, 37 P.2d 849.

[18-20] With reference to the larceny counts, I to III, the essential elements of that crime are:

1. A taking of the thing which is the subject of the crime from the possession of the owner into the possession of the thief, without the consent of the owner.

2. Asportation of the thing which is the subject matter of the offense.

3. The thing which is taken and carried away must be the property of another.

4. The taking and carrying away must be with an intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently. People v. Edwards, 1925, 72 Cal. App. 102, 112 to 116, 236 P. 944; People v. Williams, 1946, 73 Cal.App.2d 154, 166 P.2d 63. Each of these elements is fully substantiated by the evidence. Defendant's denials and assertions with reference to the circumstances under and by which he took, carried away, sold and used the proceeds from the sale of these bonds merely create a conflict in the evidence which the trial court has resolved against him. The trier of fact was entitled to disregard entirely the testimony of the defendant exculpating himself if he found it unworthy of belief. From the evidence herein the court was justified in resolving any conflict against the defendant and this court is bound by such implied finding on appeal.

We have considered defendant's claim that the trial court prejudicially erred in sustaining the objection of the prosecution to two questions propounded in defendant's behalf but find no merit therein.

The judgment and order denying defendant a new trial are affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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77 Cal.App.2d 719

BUTLER v. COMPTON JUNIOR COLLEGE DIST. OF LOS ANGELES COUNTY et al.

Civ. 15351.

District Court of Appeal, Second District, Division 1, California.
Jan. 20, 1947.

Rehearing Denied Feb. 11, 1947.
Hearing Denied March 21, 1947.

1. Schools and school districts 🔑159

In determining whether contract between junior college districts for interchange of pupils was improvident with respect to payments to be made for pupils involved in interchange, the cost per pupil set forth in certificate of attendance and cost of nonresident junior college pupils was not criterion, where purpose of certificate was to determine an entirely different question of amount of tax levy on property without any district and distribution thereof to districts educating pupils from without such districts. Education Code, §§ 1502–1504, 5476–5484.

2. Constitutional law 🔑74

Where discriminitory functions are lodged by law in a public body, court of equity does not have power to determine wisdom of contract or to interfere with exercise of such functions in absence of showing of want of jurisdiction or of fraud, corruption, or bad faith, or existence of some other fact, sufficient to vitiate the contract.

3. Schools and school districts 🔑20

Courts will not interfere with exercise of discretion vested in governing board of school district to perform school services for another district unless such action is unreasonable, unfair or tainted with fraud, corruption, or bad faith. Education Code, §§ 1502, 1503.

4. Schools and school districts 🔑80(1)

The terms of contract by which one school district performs school services for another school district are presumed to be reasonable and fair in absence of proof to contrary. Education Code, §§ 1502, 1503.

5. Schools and school districts 🔑159

A contract between junior college district providing for interchange of pupils, and that district educating smaller number of nonresident pupils should pay to the other district $35 for each pupil in excess of number of nonresident pupils educated by first district, was not abuse of discretion and would not be interfered with in absence of fraud, notwithstanding that for other purposes the cost of educating nonresident pupil was computed at a larger amount. Education Code, §§ 1502–1504, 5476–5484.

6. Municipal corporations 🔑873

The constitutional prohibition against gift of public money to municipal or other corporation does not prevent city from issuing bonds for acquisition of land to be donated to state, since the state is not a "corporation". Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

7. Schools and school districts 🔑21
States 🔑119

A "school district" is an involuntary political division of the state created by or under authority of law, and is agency of state, and is a political subdivision of county, and is not a "municipal corporation", which is created only with consent of its inhabitants, within constitutional prohibition against gift of public money to municipal corporation, and school system is matter of general state concern and is not a municipal affair. Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation" and "School District".

8. Schools and school districts 🔑64, 65

The beneficial ownership of title to school district property is in the state, and the district holds legal title as trustee, and transfer of legal title from one school district to another is merely a transfer under the same trust from one trustee to another.

9. Schools and school districts 🔑17

School moneys belong to the state, and apportionment of funds to school district does not give district a proprietary right therein.

10. States 🔑119

The applicability of constitutional prohibition against gift of public money to municipal corporation depends on whether public money is to be used for public or private purpose, and public money for public purpose within jurisdiction of appropriating board is not generally regarded as a "gift". Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

11. States 🔑119

The education of the young is a "public purpose" within rule that appropriation of public money within jurisdiction of appropriating board for public purpose is not generally a gift. Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Purpose".

12. States 🔑119

The furnishing of text books for free use by high school students is an aid to education and is not within constitutional prohibition against making of a gift of public funds to individual. Const. art. 4, § 31.

13. Schools and school districts ⚿90

A contract between junior college districts providing for interchange of pupils and that district educating smaller number of nonresident pupils should pay to the other district $35 for each pupil in excess of number of nonresident pupils educated by first district did not contemplate making of "gift" of public funds by first district in violation of constitutional prohibition against gift of public money to municipal corporation, since the districts were not municipal corporations, and the funds involved were to be used for general educational purposes. Education Code, §§ 1502, 1503; Const. art. 4, § 31.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Warren W. Butler against Compton Junior College District of Los Angeles County, a public corporation, Los Angeles City Junior College District of Los Angeles County, a public corporation, and others, to enjoin the Compton district from charging the Los Angeles district less than was averred to be the actual cost to the Compton district of educating Los Angeles pupils involved in interchange of pupils between such colleges. From a judgment denying the relief sought, the plaintiff appeals.

Affirmed.

Hanna and Morton and Roscoe R. Hess, all of Los Angeles, for appellant.

Harold W. Kennedy, Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for respondents.

WHITE, Justice.

An action was brought by a taxpayer against Los Angeles City Junior College District, Compton Junior College District and the individual members of the governing board of the latter district, seeking an injunction and declaratory relief with respect to a contract between the two districts for the interchange of pupils. In substance, the purpose of the action was to enjoin the Compton district from charging the Los Angeles district less than what was averred to be the actual cost to the Compton district of educating the Los Angeles pupils involved in the interchange. From a judgment denying the relief sought, this appeal is prosecuted.

Section 1502 of the Education Code provides in part: "One school district may perform school services for another school district, and receive pay from the other school district for the performance of the school service, whenever a contract approved by the county superintendent of schools covering the performance of and the payment for school service has been entered into by and between the governing boards of the school districts concerned. * * *."

Section 1503 of the Education Code, so far as here pertinent, provides: "The governing board of any school district may admit to the schools or classes maintained in the district any pupils who reside in another school district which maintains schools or classes of the grade level which the pupils desire to attend, whenever an agreement is entered into between the governing board and the governing board of the district of residence stipulating the terms upon which the interdistrict attendance shall be permitted, or, if the terms of a contract can not be agreed upon, whenever the county board of education having jurisdiction over the district of residence gives written authorization permitting the interdistrict attendance on such terms as may be agreed upon by the county board of education and the governing board of the district of proposed attendance. * * *."

Disregarding provisions for the acceptance of pupils in certain special classes, the effect of the contract here under attack was that the Los Angeles District agreed to accept as pupils all eligible residents of the Compton District. Compton District agreed to accept as pupils all residents of the Los Angeles District who were in the 13th and 14th grades and who resided within certain described boundaries in the Los Angeles District. The contract further provided that the district educating the smaller number of nonresident pupils in average daily attendance should pay to the other district the sum of $35 for each such pupil in average daily attendance in excess of the number of such nonresident pupils educated by the first mentioned district. It was further agreed that "in accordance with section 1504 of the Education Code, the attendance of all pupils from the respective districts covered by this agreement shall be credited to the school district of attendance for apportionment purposes" and that no payment should be made for services rendered to pupils attending the special classes not here under consideration. The phrase "apportionment purposes" refers to the sum of $90 per unit of average daily attendance paid by the state to each junior college from the state junior college fund. Educ. Code, sec. 5453.

It was charged in the complaint "that the performance of said contract of August 17, 1944, and said modification of November 27, 1944, results in a loss to the Compton District in the amount of the difference between the total sum of $90.00 received from the State Junior College Fund pursuant to Section 5453 of the Educational Code, plus the said $35.00 receivable from the Los Angeles District, to-wit, the total sum of $125.00, and the total cost to the Compton District for the current expenses per pupil educated in the Junior College in said Compton District pursuant to the terms of said contract, in the approximate sum of $253.87, or a loss per pupil for each of said 227 pupils (Average Daily Attendance) of approximately $128.87 per pupil or a total loss to said Compton District for the year 1944-45 reasonably calculable in the sum of 227 times $128.87 or $29,253.00." It was further averred that this loss was "reasonably calculable and foreseeable"; that for the past ten years, under similar contracts, the excess of Los Angeles pupils in the Compton school over the Compton pupils in the Los Angeles school has never been less than 200 and on several occasions exceeded 400. The complaint further charged that in the execution of these contracts and the particular contract in question, it was the intention of the districts involved that Compton should receive a sum per unit of average daily attendance less than the total current expense per pupil shown by the reports of the County Superintendent of Schools for the preceding year and also less than the total current expense reasonably to be anticipated.

It was also alleged that although there was no accurate method of fixing the cost to Compton of the amount reasonably chargeable for the use of buildings and equipment for the education of the Los Angeles pupils under the contract, the "Legislature of the State of California has given recognition to the existence of such cost, and to the reasonable amount thereof in the sum of $65.00 per unit of average daily attendance, by the adoption of section 5476 of the Education Code."

Plaintiff charged that the performance of the contract constituted a transaction by which there resulted a gift to the Los Angeles District of public money belonging to the Compton District, money raised by taxation within the Compton District, in violation of section 31, Article IV, of the Constitution of California; that the contract was not a fair and reasonable exercise of the discretion vested in the authorities, but an abuse thereof. Plaintiff sought also an injunction against the making of a similar contract for the fiscal year 1945–46 and also prayed for declaratory relief.

The trial court found that the excess of Los Angeles residents attending Compton over the Compton residents attending Los Angeles during the school year 1944–45 (average daily attendance) was 234.04; that "according to Exhibit 'F' in the stipulation of facts the current expenditure per unit of average daily attendance in the 13th and 14th grades in the regular day school of the Compton Junior College District for the school year 1943–44 after deducting $90 per unit of average daily attendance received from state apportionment was the sum of $231.74." The Exhibit "F" referred to is a "Certificate of Attendance and Cost of Nonresident Junior College Pupils" attending Compton, which certificate was filed by the Compton authorities with the County Superintendent of Schools pursuant to section 5476 of the Education Code, for the purpose of securing reimbursement for the cost of educating nonresident pupils residing in Los Angeles County but not within any junior college district.

The pertinent information appearing on the certificate may be summarized as follows:

1. Total current expenditures for classes above 12th grade	$165,465.91
2. Total state apportionment ($90 per pupil)	64,747.93
3. Total current expenditures less state apportionment	100,717.98
4. Total average daily attendance above 12th grade	434.62
5. Tuition chargeable per unit of average daily attendance (Item 3 divided by Item 4)	231.74

(In addition to the charge of $231.74 per pupil, the district also receives, under authority of section 5476 of the Education Code, the sum of $65 per pupil for use of buildings and equipment.)

It was stipulated, among other things, that the report of the Los Angeles County Superintendent of Schools for the school year 1943–44 contained the following data with respect to the current expense per pupil of the respective districts:

	Compton	Los Angeles
Average Daily Attendance	2,162	2,043
Instructional Expense	$320,715.54	$611,665.81
Instructional Expense per pupil	148.34	299.40
Other Current Expense	228,149.36	465,132.35
Other Current Expense per pupil	105.53	227.67
Total Current Expense	548,864.90	1,076,798.16
Total Current Expense per pupil	253.87	527.07

It was further stipulated, however, that as to Compton the above figures include an average daily attendance of 143 in Army Specialized Training Classes and expenditures therefor, but as to Los Angeles the figures do not include an average daily attendance of 605 in Army programs, although the expenditures therefor are included in the expenditures above set forth. Omitting both attendance and expenditures, so far as the Army program was concerned, the total current expense per pupil for Compton was $230.55 and for Los Angeles $288.73. It also appears that of the 2162 pupils attending Compton in the year under consideration, 1511 were of the 11th and 12th grades, i.e., in high school classes, and 651 in the regular junior college grades.

The trial court further found that the contract in question and the contemplated contract for the following year did not amount to the making of a gift in violation of section 31 of article IV of the California Constitution, and that the respective governing boards did not abuse the discretion vested in them by entering into such contracts.

On this appeal appellant presents five points: (1) That section 1502 of the Education Code is a general law that is not uniform in its operation if it permits a tax levied in one district to be used for the benefit of students from other districts; (2) that the "arbitrary price" fixed in the contract results in a gift of public funds by the Compton District in violation of section 31 of Article IV of the Constitution; (3) that the contract constitutes an abuse of discretion by the Compton District board; (4) that the findings are not supported by the evidence as to abuse of discretion; (5) that the court failed to find upon the material allegation that the "loss" for the year 1944–45 was readily foreseeable and calculable.

[1] From the facts above set forth it is clear that the foundation of the taxpayer's case is his contention that the Compton District has undertaken to educate Los Angeles pupils at a loss—in other words, that the Compton board has made an improvident contract. The only evidence produced in support of this assertion is the certificate, Exhibit "F" above referred to, similar certificates for previous school years, and the data above set forth from the stipulation of facts. It is argued by appellant that "under the Education Code, sections 5476 to 5484, the Superintendent of Schools of the County in which there is not a County Junior College must certify to the Board of Supervisors the total cost of education during the next preceding school year, of all junior college pupils residing in the county and not residing in any junior college district * * *." The certificate of the County Superintendent, which is also sworn to by an official of the junior college district involved, constitutes, appellant urges, "not only a report, but it is the *claim* of the Compton District, sworn to, for re-

imbursement of the cost *to* the Compton District of these nonresident pupils." It follows, according to appellant's view, that the cost per pupil set forth in the certificate is the criterion by which to judge the contract here in question. With this contention we cannot agree.

No method has been prescribed in the Education Code by which to determine the "cost" per pupil. As appears from Exhibit "F" hereinbefore referred to, the cost is computed, so far as pupils residing outside a junior college district are concerned, simply by dividing the total expenses for the year by the number of pupils (average daily attendance). This resulting figure is merely the average cost per pupil for the number of pupils educated, and has little significance in determining the question here presented. As pointed out by respondent, the average expenditure per pupil is not necessarily the same as the cost to Compton District of educating the *additional* pupils here involved. There is no evidence to show what the total cost of operating the Compton Junior College District would have been if the additional Los Angeles pupils had not been in attendance. The extra cost of educating the Los Angeles pupils presented an administrative problem involving a consideration of such matters as the additional expense for instructors, additional equipment, the capacity of the buildings and equipment already on hand, the fixed charges which would remain the same whether the extra pupils were accepted or not, and other factors as to which no evidence was offered.

The reports made by the Compton district to the County Superintendent of Schools, of which Exhibit "F" relied upon by appellant is an example, are required by law to cover a particular situation, the education of pupils not residing within the boundaries of any junior college district, and are for the purpose of ascertaining the amount of the tax levy upon property without any district and its distribution to districts which educate the pupils from without such districts. The question of the amount which should be received from these areas outside of any district, which areas in the absence of the provisions of sections 5476 to 5484 of the Education Code would bear none of the cost of maintaining the college that is borne by the property within the district, has little, if any, bearing upon a contract between contiguous districts, the propriety or wisdom of which may depend upon a number of factors peculiar to the districts involved.

Nothing in the sections of the Education Code hereinbefore referred to requires any district to enter into such a contract as that here under consideration should its governing board deem it inadvisable. Conceivably, should the Compton district insist upon a higher rate of compensation for educating Los Angeles pupils, the Los Angeles district might refuse to enter into a contract at all, in which event the Compton district and its taxpayers would lose the sum of approximately $29,250 ($35 per pupil from Los Angeles and $90 per pupil from the state) during the school year 1944–1945.

[2] As pointed out in the opinion rendered by the trial judge, "where discriminatory functions are lodged by law in a public body, a court of equity does not have power to determine the wisdom of a contract nor to interfere with the exercise of such functions in the absence of a showing of want of jurisdiction, or of fraud, corruption, or bad faith, or the existence of some other fact sufficient to vitiate the contract." In re City and County of San Francisco, 191 Cal. 172, 185, 215 P. 549; Nickerson v. County of San Bernardino, 179 Cal. 518, 522, 177 P. 465; Skidmore v. West, 186 Cal. 212, 220, 199 P. 497; Potter v. City of Compton, 15 Cal.App.2d 232, 235, 59 P.2d 537.

In Fillmore Union High School Dist. v. Cobb, 5 Cal.2d 26, 32, 53 P.2d 349, 351, the Supreme Court, adopting the opinion of the District Court of Appeal for the Third Appellate District, said, with respect to the discretion involved in a similar situation:

"It would be impracticable for the Legislature to attempt to specifically prescribe all the terms and rules under which pupils may be permitted to attend high schools outside the particular district in which they reside since the equity of such terms may depend upon peculiar local conditions. It would therefore seem to be wise and proper that the adoption of such terms within the general scope prescribed by the statute be delegated to the interested school boards or to the superintendent of schools. It necessarily follows that such delegated discretionary authority should be exercised by the board or administrative officer in a fair and reasonable manner. The terms which are adopted are presumed to be reasonable, in the absence of proof to the contrary. * * *."

In Berkeley High School Dist. v. Coit, 7 Cal.2d 132, 59 P.2d 992, in a proceeding to compel the countersigning of tax anticipation notes authorized by the governing board of the district pursuant to statutory authority, the court said, 7 Cal.2d at page 136, 59 P.2d at page 993: " 'The resolutions and requests shown in the petition herein, and which it is admitted were duly adopted and made, are presumptive evidence of the facts therein declared. It is presumed that official duty has been regularly performed. * * * The choice is between the issuance of interest-bearing treasury warrants, or the saving of interest charges by making these short-time loans. The decisions thereon is a matter of discretion in the administration of ordinary public business. * * * Where the act of a local or subordinate legislative body is not only legislative but also is discretionary in the required exercise of judgment, concerning a matter committed to its care, the courts "cannot enter the board room * * * nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised." Nickerson v. San Bernardino County, 179 Cal. 518, 177 P. 465, 467.' "

[3-5] While it is contended that the Compton District board was guilty of an "abuse of discretion," the record does not contain any intimation that the governing boards of either of the contracting districts acted from any motive of fraud or bad faith. As heretofore pointed out, the legislature has seen fit to delegate to the interested school boards the right to negotiate and agree upon terms and rules under which pupils may be permitted to attend schools in a district outside of the particular district in which they reside. This, as pointed out, because the equity and wisdom of such terms may depend upon peculiar local conditions. We have heretofore adverted to certain conditions that might well have been present in the contract now before us that justify the wisdom of the Compton District board in entering into the contracts in question. That such, or other, local conditions were not present does not appear from the evidence. The courts, therefore, cannot interfere with the exercise of the discretion vested in the governing board of the school district unless such action is unreasonable, unfair, or tainted with fraud, corruption or bad faith. As to the reasonableness and fairness of the board's action, it may be said that the terms of the contract agreed upon are presumed to be reasonable and fair in the absence of proof to the contrary. Fillmore Union High School Dist. v. Cobb, supra, 5 Cal.2d at page 32, 53 P.2d 349. Having in mind the discretion with which the school board was clothed in the administration of ordinary public business committed to its care, we find in the record before us none of the elements which would justify judicial interference with the action taken.

Concerning appellant's claim that the contract entered into in 1944 and that contemplated in 1945 amount to the making of a gift of public moneys in violation of the provisions of section 31 of article IV of the Constitution, we have concluded that the decision thereon reached by the learned trial judge correctly disposes of that issue. We therefore adopt as part of our opinion herein the following language taken from the opinion prepared by the trial judge, Hon. Emmet H. Wilson, when this cause was pending before him:

[6-9] "Section 31 of Article IV of the Constitution provides that the legislature shall not have power 'to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal, or other corporation whatever.' This provision does not prevent a city from issuing bonds for the acquisition of land to be donated to the state, the

latter not being a corporation. City of Sacramento v. Adams, 171 Cal. 458, 462, 153 P. 908, A school district is not a municipal corporation. People v. Rinner, 52 Cal.App. 747, 751, 199 P. 1066. It is a political division of a county (Id., 52 Cal.App. at page 752, 199 P. 1066) and a county is not a municipal corporation. People v. McFadden, 81 Cal. 489, 497, 22 P. 851, 15 Am.St.Rep. 66; County of San Mateo v. Coburn, 130 Cal. 631, 636, 63 P. 78. A municipal corporation is created only with the consent of its inhabitants, but a school district is an involuntary political division of the state, created by or under the authority of general laws. Skelly v. Westminster School Dist., 103 Cal. 652, 658, 37 P. 643. A school district is an agency of the state (Board of Education v. Davidson, 190 Cal. 162, 168, 210 P. 961; Skelly v. Westminster School Dist., supra; Fawcett v. Ball, 80 Cal.App. 131, 136, 251 P. 679); the school system is a matter of general state concern and is not a municipal affair. Kennedy v. Miller, 97 Cal. 429, 431, 32 P. 558; Hancock v. Board of Education, 140 Cal. 554, 561, 74 P. 44; Malaley v. City of Marysville, 37 Cal.App. 638, 642, 174 P. 367. The beneficial ownership of the fee title to school district property is in the state and the district holds legal title as trustee. The transfer of the legal title from one school district to another is merely a transfer under the same trust from one trustee to another. Pass School District v. Hollywood City School District, 156 Cal. 416, 419, 105 P. 122, 26 L.R.A., N.S., 485, 20 Ann.Cas. 87. School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein. Kennedy v. Miller, supra, 97 Cal. at page 435, 32 P. 558; Gridley School District v. Stout, 134 Cal. 592, 66 P. 785.

[10] "The application of section 31 of Article IV of the Constitution depends on whether the public money is to be used for a public or a private purpose. If it is for a public purpose and is within the jurisdiction of the appropriating board or body it is not, generally speaking, to be regarded as a gift. City of Oakland v. Garrison, 194 Cal. 298, 302, 228 P. 433; People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, 413, 108 P.2d 923; County of San Diego v. Hammond, 6 Cal.2d 709, 724, 59 P.2d 478, 105 A.L.R. 1155.

[11, 12] "The education of the young is a public purpose of the greatest importance, fraught with no less consequence than the purposes for which the expenditure of public funds was approved in O'Dea v. Cook, 176 Cal. 659, 169 P. 366, (police pensions), Allied Architects' Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029 (veterans' memorial hall), and the various purposes mentioned in County of Los Angeles v. La Fuente, 20 Cal.2d 870, 877, 129 P.2d 378. The furnishing of textbooks for free use by high school students is an aid to education and is not within the constitutional inhibition of the making of a gift to any individual. MacMillan Co. v. Clarke, 184 Cal. 491, 499, 194 P. 1030, 17 A.L.R. 288.

[13] "It is clear from the foregoing citations that by reason of the fact that the school funds involved in this action are to be used for general educational purposes, and that neither of defendant districts is a municipal corporation, the contracts in question do not contemplate the making of a gift of public funds by the Compton District in violation of the constitutional prohibition. The expired contract and the one about to be executed are contracts that the board of trustees of said district was authorized by law to enter into, unless in so doing they were guilty of an abuse of discretion."

Additional cases supporting the trial court's views in this respect are Edmondson v. Board of Education, 108 Tenn. 557, 69 S.W. 274, 58 L.R.A. 170, and Edwards v. State, 143 Ind. 84, 42 N.E. 525.

The conclusion at which we have arrived upon the issues herein discussed make it unnecessary to consider other points raised on this appeal.

For the reasons herein stated we are of the view that the judgment should be affirmed, and it is so ordered.

YORK, P. J., and DORAN, J., concur.

77 Cal.App.2d 599

OSWALD v. SALTER et al.

Civ. 15577.

District Court of Appeal, Second District,
Division 1, California.

Jan. 10, 1947.

As Modified Feb. 5, 1947.
Hearing Denied March 10, 1947.

1. Taxation ⚿803, 805(4)

The statute providing that a proceeding, based on alleged invalidity or irregularity of any deed to state for taxes or of any "proceeding" leading up to deed, can only be commenced within one year after date of recording of deed to state, does not bar a defense that tax deeds are invalid, though more than one year has elapsed, since statute bars only a proceeding based on such invalidity. Revenue and Taxation Code, § 3521.

2. Taxation ⚿803

The statute, providing that a defense based upon alleged invalidity or irregularity of any proceeding instituted under Revenue and Taxation Code can be maintained only in a proceeding commenced within one year after date of execution of tax collector's deed, does not bar a defense that tax deeds to the state are invalid, though raised after more than one year, since statute relates to attacks on tax deeds from and not to the state. Revenue and Taxation Code, § 3726.

3. Taxation ⚿786
Tenancy in common ⚿3

One claiming title to realty under tax deeds from county tax collector, and those claiming title by reason of subsequent city treasurer's deeds issued after foreclosure for street improvement bonds, had rights that were on parity, and they were therefore "tenants in common" and owned an equal undivided interest in the realty. Revenue and Taxation Code, § 3900.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenants in Common".

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by M. E. Oswald against Fred R. Salter, Jr., and Amanda Salter and others to quiet title to three parcels of realty. From a judgment quieting plaintiff's title to each of the lots in question, the defendants appeal.

Judgment reversed with directions.

John F. Bender and G. Loshoncy, both of Los Angeles, for appellants.

Ernest A. Oswald, of Los Angeles, for respondent.

DORAN, Justice.

The action herein was instituted by respondent for the purpose of quieting title to three parcels of real property in the City of Los Angeles, designated in the complaint as portions of Lot 4 in Block 18; and of Lots 1 and 5 in Block 16. The respondent claims title thereto by virtue of certain tax deeds from the Los Angeles County Tax Collector, dated May 4, 1942, as to Lot 4, and June 26, 1942, covering Lots 1 and 5. Appellant Amanda Salter claims to own Lot 4 by reason of a Los Angeles City Treasurer's deed recorded June 16, 1942, issued after foreclosure of a street improvement bond authorized under the Improvement Act of 1911, St.1911, p. 730, such bond being dated February 19, 1926. In regard to this lot the city treasurer's certificate of sale was issued to Merchants Finance Corporation and assigned to Amanda Salter. Appellant Fred R. Salter, Jr., claims the ownership of Lot 1 under a quitclaim deed from the Merchants Finance Corporation, which corporation was the grantee in a Commissioner's Deed recorded July 7, 1937, based upon the foreclosure of a street improvement bond issued against said property pursuant to the Improvement Act of 1911, the bond being dated February 19, 1926. Fred R. Salter, Jr., likewise claims to own Lot 5, Block 16 by virtue of a Commissioner's Certificate of Sale in a similar improvement bond foreclosure, issued on October 24, 1939, to Pacific States Properties, and assigned to Salter on October 27, 1939; in respect to this lot no Commissioner's Deed has been issued.

The trial court found that each of the conveyances to the plaintiff "was a good and valid tax deed executed pursuant to law," and that liens created by the Commissioner's Certificates of Sale and the City Treasurer's Certificate of Sale, issued on foreclosure of improvement bonds as hereinbefore mentioned, upon which defendants relied, were "subordinate and inferior to the title of the plaintiff," and were "rendered of no force, validity, or effect by reason of the execution of the tax deed(s) of said real property to the plaintiff." The present appeal is from the resulting judgment quieting respondent's title to each of the three lots in question.

The appellants' brief states the fundamental contentions of the respective parties as follows: "Plaintiff (respondent) contends that the tax deed title to the property is superior to special assessment liens and title derived therefrom, and defendants Salter (appellants) contend that defendants' title, based upon foreclosure of street improvement bond liens, and plaintiff's title, based upon tax deeds issued for non-payment of taxes, are on a parity, neither being superior or subordinate to the others. Defendants Salter contend that the tax deeds to the State and from the State were void for the reason that the publication of the entire delinquent list was split between more than one newspaper * * * and, therefore, did not comply with Section 3766 of the Political Code then in force and effect, and that the noncompliance * * * was not cured by the Curative Act of 1945 (Statutes of 1945, Chapter 1134, p. 2176) for the reason that the defendants' rights intervened between the date of the tax deed to the State and the adoption of said Curative Acts."

[1, 2] In answer to these contentions, respondent insists that "The defendants have failed to prove that they represent any rights which have 'intervened' between the so-called defective publication * * * and the issuance of the tax deed to the plaintiff"; further, that "The Statute of Limitations" has run upon the rights of the defendants to attack the validity of plaintiff's tax deeds." Respondent has cited two provisions said to bar appellants' attack on the tax deeds in question. Sec. 3521 of the Revenue and Taxation Code reads as follows: "* * * A *proceeding* based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceeding leading up to the deed can only be commenced within one year after the date of recording of the deed to the State," etc. (Italics added.) Section 3726 of the Revenue and Taxation Code provides that "* * * A *defense* based on the alleged invalidity or irregularity of any proceeding instituted under this chapter can be maintained only in a proceeding commenced within one year after the date of execution of the tax collector's deed." (Italics added.) However, as pointed out in appellants' brief, neither of the above quoted sections constitutes a bar to appellants' claim. Section 3521 relates to "alleged invalidity or irregularity of any deed to the State," which is the point involved in the present controversy, but by its language bars only a "*proceeding*" based on such alleged validity; such section does not purport to prohibit a *defense* based upon alleged invalidity. Appellants did not institute any proceeding here, and the point was raised only by way of defense. Section 3726 is likewise inapplicable for the reason that this section, and the chapter in which it is found, relate to attacks upon the validity of tax deeds *from* and not *to* the State. Respondent's brief observes "that defendants confined their attack upon the plaintiff's tax deeds upon the grounds that the deeds *to* the State of California were defective." In reference to appellants' alleged rights, intervening or otherwise, it may be observed, as noted in appellants' brief, that the introduction in evidence of Superior Court files of actions to foreclose the street improvement bonds under which appellants claim title, commissioner's certificates and deeds, city treasurer's deeds, etc., established prima facie rights in the appellants. The validity, nature, extent and priority of those rights is, of course, under attack by the respondent who prevailed in the trial court.

[3] The principal question involved on this appeal, namely, whether the respondent's tax deed title is superior to appellants' title derived from the foreclosure of street improvement bonds, or whether the two titles are on a parity, is not a new one in this state. In this connection the

express provisions of Section 3900 of the Revenue and Taxation Code may first be noticed: "It is hereby declared to be the policy of the State and the intent of the provisions in this code contained, that the final tax deed or deeds of all taxing agencies, including counties, cities and counties, cities, irrigation districts, reclamation districts, and other taxing agencies that annually levy, assess and collect taxes or assessments upon real property within the State, should be and they are hereby declared to be upon a parity with each other, and that regardless of when the levy * * * is or has been made, and regardless of when the final tax deed or assessment deed is or has been taken by such taxing agency, that the rights of all taxing agencies and all such deeds shall be equal and upon a parity with each other."

The case of Monheit v. Cigna, 1946, 28 Cal.2d 19, 168 P.2d 965, has been accorded particular attention in the briefs of both parties. The Supreme Court of this state held that a person holding title by deed after foreclosure of street assessment bonds issued under the Improvement Act of 1911 which specifically provides that such a deed conveys absolute title free from all encumbrances except liens for taxes, "does not have a right superior to that of the plaintiff-holder of a deed from the state based upon a sale for delinquent general taxes, and the reverse is also true". Among other previous decisions the Monheit case cites with approval Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82, in respect to which case respondent's brief says: "I frankly admit that this case is contrary to the position of the plaintiff here," but contends that the Neary opinion is unsound.

The doctrine of parity announced in these cases has been adhered to in the recent case of Security Investment Co. v. Douglas, 1946, 76 Cal.App.2d 592, 173 P.2d 672, modified in 76 Cal.App.2d 597, 173 P.2d 672, involving a situation not dissimilar to that of the present controversy. There, as here, the title claims of the respective parties were bases on tax deeds issued to plaintiff, and on foreclosure of street assessment bonds by a predecessor in defendant's chain of title; and the Curative Act of 1943, St.1943, p. 1993, was held applicable to validate tax deeds executed pursuant to defective sales, although defendant's property interest vested prior to passage of the statute. The Security case likewise involved alleged "split" publications among several newspapers, of the delinquent tax list, and at page 596 of 76 Cal.App.2d, at page 675 of 173 P.2d, the court said: "That the procedure adopted herein relative to 'split' publications of the delinquent tax list in question was fatally defective does not of itself prevent the exercise of the curative power, for, as said in Miller v. McKenna, supra, 23 Cal.2d [774, at] page 781, 147 P.2d 531, 'If it was not fatally defective it would stand in no need of the healing power.'" The Miller v. McKenna case held that the legislature may cure all defects in the taxing process not violative of constitutional rights. In the Security case the court held that the defect in question was not jurisdictional, and quoting from Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567, said: "The fact that other property was not included in the publication does not vitally disparage the fact of notice to the plaintiff; nor has the plaintiff been deprived of any constitutional right." It was therefore held, as must be held in the present case, that the "tax deeds to and from the state and special assessments, or deeds issued thereon, are on a parity," and that "the holders of deeds herein own the property as tenants in common."

Respondent insists that "Public policy favors the liens of taxes of the first and second classes (general taxes and the like) but is not concerned with taxes of the third class (such as street improvement bonds)." In connection with such alleged distinction the respondent seeks an escape from the language used in Section 3900 of the Revenue and Taxation Code, Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, and elsewhere, to the effect that the liens of all "taxing agencies" are on a parity, by affirming that "a street improvement bond or a deed isssued thereon is not a taxing agency." Since the improvement assessments involved herein were not general obligations but were liens against individual lots, and were payable to private bond holders rather than directly to some "taxing agency" such as a state, county or city, it is argued that the parity rule does not apply and that appellants' title was inferior to and cancelled by respondent's general tax deeds. The difficulty with this argument is that while obviously, as respondent says, the "street improvement bond or deed issued thereon is not a taxing agency" in itself, nevertheless it is quite as obvious that special improvement assessments of the nature involved herein, to be of any validity whatsoever, must result from the authorized action of some "taxing agency." As respondent's tax deeds stem from official action resulting from a failure to pay general taxes collected by a county, so the appellants' title derives from a similar delinquency in respect to special assessments lawfully created for the improvement of city streets. So far as the present controversy is concerned, any attempted distinction based upon a limited interpretation of the term "taxing agency" must be held to be without merit, a distinction without a difference. Moreover, the fact that the designated procedure for the collection of general taxes and of street improvement assessments is not the same, is of no fundamental importance in the instant litigation. No case has been cited which would justify the holding contended for; on the contrary, the recent cases hereinbefore cited, namely, Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, modified in 28 Cal.2d 28, 168 P.2d 965; and Security Investment Co. v. Douglas, 76 Cal.App.2d 592, 173 P.2d 672, modified in 76 Cal.App.2d 597, 173 P.2d 672, together with the earlier decisions therein, clearly sustain the appellants' contention that the two titles are on a parity.

The judgment is therefore reversed with directions to enter a judgment to provide that title to the property described as portions of Lots 1 and 5, Block 16 is held by plaintiff and the defendant Fred R. Salter, Jr., as tenants in common, each owning an undivided one-half interest therein; and that the title to the property described as a portion of Lot 4, Block 18 is held by plaintiff and the defendant Amanda Salter, as tenants in common, each owning an undivided one-half interest therein; that in the case of each lot the title thereto is held, in the language of Monheit v. Cigna, and Security Investment Co. v. Douglas, subject to a lien in favor of each tenant against the entire property in the amount which was paid for his or its (her) interest.

YORK, P. J., and WHITE, J., concur.

EDISON CALIFORNIA STORES, Inc., v. McCOLGAN, Franchise Tax Commissioner (two cases).*

L. A. 19603, 19604.

Supreme Court of California, in Bank.
Jan. 17, 1947.
Rehearing Granted Feb. 13, 1947.

1. Taxation 🔑108

Persons may adopt any lawful means for the lessening of the burden of taxes.

2. Statutes 🔑245

Courts in interpreting statutes levying taxes may not extend their provisions by implication beyond the clear import of the language used, nor enlarge on their operation so as to embrace matters not specifically included, and in case of doubt, construction is to favor the taxpayer rather than the government.

3. Taxation 🔑4

The legislature may enact measures to prevent avoidance of taxes otherwise properly laid.

4. Taxation 🔑376(4)

The mere production of a separate accounting system for one of the branches of an entire or unitary business, part of which is carried on in the state and part outside, is insufficient, without more, to overthrow an appropriation formula based on the appropriate facts of sales, property, and payroll, for determining amount of franchise tax under the Bank and Corporation Franchise Tax Act. Gen.Laws, Act 8488, §§ 1 et seq., 10.

5. Taxation 🔑376(4)

Only if taxpayer can meet burden of showing by sufficient evidence that allocation formula used in determining franchise tax imposed on that portion of a unitary business located within the state, under the Bank and Corporation Franchise Tax Act, does not apportion to the state that part of the entire net income reasonably attributable to business done in the state, will court disapprove its use in the particular case, and evidence introduced to overcome the formula method of allocation must go to each element of the formula equation. Gen.Laws, Act 8488, §§ 1 et seq., 10.

6. Taxation 🔑376(4)

Where business of parent Delaware corporation and subsidiary corporations, including subsidiary in California, was owned and managed under one centralized system, the business was "unitary business" so as to require fair system of apportionment by statutory formula method in determining portion of income derived from business done within California for franchise tax purposes. Gen.Laws, Act 8488, §§ 1 et seq., 10

See Words and Phrases, Permanent Edition, for all other definitions of "Unitary Business".

7. Taxation 🔑376(4)

Where unitary method of ownership, use and operation of business of parent Delaware corporation and its subsidiary corporations, including California subsidiary, was established, there was sufficient evidence to justify application of formula allocation method in determining portion of such income derived from business done within California for franchise tax purposes, and it was then incumbent on California subsidiary to produce evidence to meet burden devolving on it to show that formula allocation method was arbitrary and unreasonable. Gen.Laws, Act 8488, §§ 1 et seq., 10.

8. Taxation 🔑543(7)

In actions by subsidiary California corporation which with parent Delaware corporation and other subsidiary corporations engaged in a unitary business, to recover franchise taxes which were paid under protest, and which were apportioned by statutory formula method, corporation's evidence was insufficient to overcome correctness of each element of the formula equation and the reasonableness of the application thereof, though corporation's separate accounting system was accurate and fair. Gen.Laws, Act 8488, §§ 1 et seq., 10.

9. Limitation of actions 🔑6(10)

Where taxpayer's franchise tax return was filed in March 1937, when statute required that notice of additional tax must be mailed to taxpayer within three years after filing of return, but in 1939 statute was amended to increase three year period to four years, notice mailed in November 1940 of additional tax for 1937 was timely, since amendments extending statutes of limitations apply to pre-existing claims not already barred, unless amendatory act expressly otherwise provides. Gen.Laws, Act 8488, §§ 21, 25.

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* Subsequent opinion 183 P.2d 16.

10. Constitutional law ⚿107
Limitation of actions ⚿4(2)

An amendment to a statute of limitations enlarging the period of time within which an action may be brought as to pending causes is not "retroactive legislation" and does not impair any vested right, since one has no vested right in the running of a statute of limitations until it has completely run and barred the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Retroactive Legislation".

◆

Appeals from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Actions by Edison California Stores, Inc., a corporation, against Charles J. McColgan, as Franchise Tax Commissioner, etc., to recover franchise taxes paid under protest for the taxable years 1937 and 1938. From a judgment for plaintiff in both actions, the defendant appeals.

Judgments reversed.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for appellant.

Loewenthal & Elias, Harold Epstein and Paul Loewenthal, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff, a California corporation, brought these two actions to recover franchise taxes paid under protest for the taxable years 1937 and 1938. The trial court rendered judgment for the plaintiff in both actions and the defendant appealed. The appeals are presented on a single set of briefs.

Prior to 1929 Edison Brothers engaged as partners in the retail shoe business in Atlanta, Georgia. They expanded their operations to include stores in Louisiana, Alabama and Tennessee. In 1926 the business was organized as a corporation under the laws of the State of Georgia. In 1929 a corporation, Edison Brothers Stores, Inc., was organized under the laws of Delaware and acquired all of the capital stock of the Georgia corporation. The Delaware corporation established and operated stores in several other states, including Missouri, Illinois, Ohio, Tennessee and California. In 1930 the stores in Missouri and Tennessee were incorporated under the laws of those states. An Illinois corporation was also organized. In 1932 the plaintiff was incorporated under the laws of this state. In all, fifteen subsidiary corporations were formed. They are located in as many states and their capital stock is owned and controlled by the Delaware corporation. Members of the Edison family, who reside in St. Louis, Missouri, constitute the officers and directors of all the subsidiary corporations and of the Delaware, or parent, corporation. A central management division, a central purchasing department, a central distributing department, a central store operations department, a central advertising department, and various other central administrative departments function in St. Louis. These centralized departments determine operating policies and keep the main accounting records for all of the subsidiaries. The parent corporation manufactures no goods, but purchases ladies' shoes, shoe findings, accessories, hand bags, hosiery and costume jewelry for distribution and retail sale by itself and each of its subsidiaries. The quantity of merchandise for shipment to each store for resale is determined in St. Louis from a statistical analysis of daily reports sent in by the store managers. The foregoing services are performed by the Delaware corporation pursuant to agreements between it and each subsidiary by which the cost of merchandise plus a specified percentage is charged to each subsidiary, in addition to a proportion of the general overhead.

The plaintiff sells the merchandise received by it from the parent corporation exclusively within the state. It conducts no interstate sales. For each of the taxable years 1937 and 1938 it filed a franchise tax return showing gross receipts less claimed deductible expenses in accordance with a separate accounting system based on the agreement between the subsidiary and the parent corporation. For the taxable year 1937 the plaintiff showed a net (1936) income of $68,299.90, and a tax computed thereon of $2,731.99, which it paid. Subsequently the plaintiff received a notice of additional assessment in the sum of $12,329.73. After protest and oral hearing the additional assessment was recomputed and redetermined at $5,161.09 with interest thereon, which the plaintiff paid under protest, and thereupon filed a claim for refund which was denied. The return for the taxable year 1938 reported a net (1937) income of $17,808.58 (although there was an increase of $900,000 in sales) as to which the plaintiff paid a franchise tax of $712.34. Similarly the Franchise Tax Commissioner assessed an additional tax of $13,789.70, which after hearing on the plaintiff's protest was reduced to $6,313.35. This sum with interest the plaintiff paid under protest and filed a claim for refund which was rejected.

The additional assessments resulted from the commissioner's application of a three-factor formula to allocate the net income of the plaintiff, considered as an integral unit in an entire business comprising the parent and all of its subsidiary corporations. The commissioner, with reliance on Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, contended that on the basis of the asserted unitary relationship, the figures submitted reflected the true net income attributable to the business done within this state.

By a finding that the plaintiff transacted only intrastate business the trial court drew the conclusion that the separate accounting method, as distinguished from the method based on formula allocation, properly reflected the net income attributable to business done within the state. The court also found that the plaintiff's book entries were accurate and reasonable. Implicit in the findings is the conclusion that there was no falsification or bad faith in the manner of book-keeping employed by the plaintiff, nor in the entry of any of the items contained therein, nor any intent thereby to reflect an improper income or create an artificial loss. The judgments may therefore be proper if the fact of the organization of the California business as a domestic corporation distinguishes it in principle from the case of Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991.

[1-3] Persons may adopt any lawful means for the lessening of the burden of taxes which in one form or another may be laid upon properties or profits. Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284 P. 663. It was also reiterated in that case that courts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included. In case of doubt, construction is to favor the taxpayer rather than the government. But unquestionably the Legislature may enact measures to prevent avoidance of taxes otherwise properly laid.

In this state the Legislature has enacted the Bank and Corporation Franchise Tax Act (Stats.1929, p. 19, as amended, 3 Deering's Gen.Laws, Act 8488), herein referred to as the act, pursuant to the power vested in it by section 16 of article XIII of the state Constitution. By section 4 of the act a corporation doing business within the limits of the state for the privilege of exercising its corporate franchise in the state, is subject to an annual tax measured by four per cent of its net income earned during the preceding fiscal or calendar year, the minimum tax being $25.

Section 10 of the act, in effect during the period involved, provided that if the entire business of the corporation is not done within the state, the tax should be measured by that portion thereof derived from business done within the state, determined by a method of allocation upon the basis of sales, purchases, expenses of manufacture, payroll, values and situs of tangible property, or any of them or of other factors, or by such other method of allocation as may be fairly calculated to assign to the state the portion of net income reasonably attributable to business done within the state.

Section 12 provided that the net income should be computed in accordance with the method of accounting regularly employed by the taxpayer, but if that method does not clearly reflect the income, "The computation shall be made in accordance with such method as in the opinion of said commissioner does clearly reflect the income."

Section 14, in effect during the period involved, dealt with two or more corporations owned or controlled directly or indirectly by the same interests, with authority in the commissioner to apportion or allocate the income or deductions among them if he deemed it necessary to prevent evasion of taxes, or to require a consolidated report or such other facts as might be deemed essential to determine the amount of net income.

Butler Brothers **v.** McColgan, supra, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, involved the application of section 10 of the act to determine the net income attributable to business done within this state by a foreign corporation exercising its corporate franchise here. Butler Brothers was an Illinois corporation engaged in purchasing dry goods and general merchandise from manufactures and distributing them to wholesale houses owned by it in seven states, including California, for resale to retailers only. It maintained a central buying division. The cost of goods and the transportation charges were entered on the books of the house which received the goods. The actual cost of operating the central buying division was allocated among the houses, as also were common expenses, such as executive salaries, accounting and advertising. No question was raised as to the accuracy of the charges to each house. By the method of computation employed by it the taxpayer reported a loss of $82,851 for the year 1935 from operations in California. But in that year operations of all houses yielded a net profit of $1,149,677. The commissioner, pursuant to section 10 of the act, by a method of formula allocation —that is by averaging the percentages which (1) the value of real and tangible personal property, (2) wages, salaries, commissions and other compensation paid to employees, and (3) gross sales, less returns and allowances, attributable to the California house, bore to the corresponding items of all houses—allocated to California 8.1372 per cent of the entire net profit. Instead of a loss of $82,851 for operations in California, this method attributed to California business a net profit of $93,500. The facts also showed that of the gross sales of $66,326,000 by all the houses, $5,206,000 thereof were by the California house, and that the gross volume of sales in California was substantially in the same proportion to the entire gross business as the percentages resulting from the formula allocation method. The use of the formula method of allocating the amount of business attributable to operations in California was upheld by this court and by the Supreme Court of the United States. This court said (17 Cal.2d at pages 667, 668, 111 P.2d at page 336): "It is only if its business within this state is truly separate and distinction from its business without this state, so that the segregation of income may be made clearly and accurately, that the separate accounting method may properly be used. Where, however, interstate operations are carried on and that portion of the corporation's business done within the state cannot be clearly segregated from that done outside the state, the unit rule of assessment is employed as a device tor allocating to the state for taxation its fair share of the taxable values of the taxpayer." This court pointed out that the general test for the unit rule of assessment was the unity of use and management; that is, if the operations in California contributed to the net income derived from the entire operations in the United States, then the entire business is so clearly unitary as to require a fair system of apportionment by the formula method in order to prevent either overtaxation or undertaxation. It was also observed that the purchasing and the sales activities were interdependent and supplemented each other to form one single, unitary business; that purchase price differentials were affected by the unitary power; and that sales in each of the states must be proportionately credited with the profits resulting from the purchasing power which such sales in the aggregate produced. Other factors in addition to purchasing which indicate the unitary character of the business were pointed out, namely, the central advertising, accounting and management divisions. The employment of the allocation method in any case of unitary business was approved so long as it was not intrinsically arbitrary and produced no unreasonable result; also that where a business is unitary in character, so that its separate units could not fairly be considered by themselves and the whole business in the several states derived a value from the unity of use, allocation of income upon a reasonable formula was sustainable. This court declared that the burden was upon the taxpayer to show that the method was arbitrary or produced unreasonable results. It was considered that the unitary nature of the business was definitely established by (1) unity of ownership; (2) unity of operation evidenced by central purchasing, advertising, accounting and management; and (3) unity of use in the centralized executive force and general system of operation. It was concluded that the application of the formula to allocate the proportion attributable to this state of net income of an entire unitary system was within the purview of the statute which measured the tax on the income derived from business done within the state.

At the time of the Butler Brothers decision the latest expression of the Supreme Court of the United States upholding the propriety of the use of formula allocation where unitary management was shown, was said to be in 1936. North American Cement Corporation v. Graves, 269 N.Y. 507, 199 N.E. 510; Id., 299 U.S. 517, 57 S.Ct. 311, 81 L.Ed. 381. In 1941 that court affirmed the decision of this court in the Butler Brothers case with an opinion upholding the formula method of allocation in such cases. It was held that one who attacks a formula of apportionment assumes the burden of showing that it has resulted in the taxation of extraterritorial values. It was there declared that since all the factors in the conduct of the Butler Brothers business were essential to the realization of profits, the business was properly treated as unitary; that the apportionment formula based on property, payroll and sales was not inappropriate where the contribution of the California branch to the advantages of centralized management of the unitary enterprise and to the entire net income earned was not questioned; and that the employment of the formula method was fairly calculated to assign to California that portion of the net income reasonably attributable to business done within the state.

[4, 5] The Butler Brothers case demonstrates that the mere production of a separate accounting system for one of the branches of an entire or unitary business is insufficient without more to overthrow an apportionment formula based on the appropriate factors of sales, property and payroll. The fairness of the three-factor formula was thereby settled. Only if the taxpayer can meet the burden of showing by sufficient evidence that the allocation formula does not apportion to California that part of the entire net income reasonably attributable to the business done in the state will the court disapprove its use in the particular case. The evidence introduced to overcome the formula method of allocation must go to each element of the formula equation. Butler Brothers v. McColgan, supra, 17 Cal.2d at pages 677, 678, 111 P.2d 334.

[6] In the present case all of the elements of a unitary business are present—unity of ownership, unity of operation by centralized purchasing, management, advertising and accounting, and unity of use in the centralized executive force and general system of operation. The business of the parent and all of its subsidiaries is owned and managed under one centralized system, to the same extent as in the Butler Brothers case and other cases considered therein. Thus the business is unitary regardless of the fact that in the Butler Brothers case there was but one corporation involved, owning as parts of the unitary system seven different branches in as many states, and that in the present case there is a parent corporation owning and controlling as units of one system

fifteen different branches organized as corporations in as many states. No difference in principle is discernible. If the crux of the matter is to ascertain that portion of the business which is done within this state, then the same considerations justify the use of the formula allocation method in the one case as in the other.

The plaintiff contends that the statute does not authorize the commissioner to apply the apportionment formula when the taxpayer is a California corporation, and is not the foreign (parent) corporation as in the Butler Brothers case.

It may be assumed that section 14 of the act, which authorizes the commissioner to require a consolidated return, contemplates two or more corporations both or all of which are taxable as doing business within the state. See Bay Cities Transp. Co. v. Johnson, 8 Cal.2d 706, 68 P.2d 710. Power to apply the formula allocation in this or in the Butler Brothers case is not derived from the authority to require the filing of consolidated returns, since the latter indicates that the income of the group will be taxed as a unit. The power flows from the authorized method of ascertaining the income attributable to a taxpayer's activities within the state; and by a parity of reasoning the authority to pursue the method is present whenever activities are partially within and partially without the state (section 10), as in the case of a unitary system, whether the integral parts of the system are or are not separately incorporated; or (under section 12) the accounting system of the taxpayer does not clearly reflect the income, which may be in the case when it is part of a unitary system. The Legislature by enacting the foregoing sections, and the courts in the Butler Brothers decisions, recognized that the separate accounting method is appropriate to determine the true income of a separate business; but that when the business is not separate, and is an integral part of a larger and unitary system, the separate accounting is inadequate and unsatisfactory in ascertaining the true result of the activities and values attributable to that business. If the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary; otherwise, if there is no such dependency, the business within the state may be considered to be separate. Within that test it may not properly be contended that the taxpayer in the present case is doing a separate business.

The ascertainment of income by the apportionment method is not necessarily a disregard of the corporate entity nor an extension of the provisions of the statute by implication. Formula allocation is merely a method of ascertaining the true income attributable to the plaintiff's business, and is a method of ascertainment authorized by the statute. In In re Morton Salt Co., 150 Kan. 650, 95 P.2d 335, at pages 338, 339, the propriety of disregarding the corporate form by the allocation method of ascertaining income in a unitary business was indicated, with citation of other cases. By a memorandum opinion in People ex rel. Federal Motor Truck Co. v. Lynch, 264 N.Y. 679, 191 N.E. 623 certiorari denied 296 U.S. 588, 56 S.Ct. 99, 80 L.Ed. 416), the New York Court of Appeals upheld the determination of the state tax commissioner modifying an assessment against a subsidiary corporation upon the basis of the combined net income and combined segregated assets of the parent, a Michigan corporation, and its had property or did business in New York State.

Reliance on Burroughs Adding Machine Co. v. Tax Comm., 237 Wis. 423, 297 N.W. 574, does not avail the plaintiff. See, also, Northern States Power Co. v. Tax Comm., 237 Wis. 433, 297 N.W. 578. The court in that case rejected a particular ratio method of ascertaining the income of the taxpayer as unauthorized by the statute. There the taxpayer was a subsidiary corporation of a foreign corporation parent. The court conceded the fairness of an appropriate authorized allocation method to reach the desired objective, that is, to ascertain the amount of income in the state of the taxpayer as a member of a unitary system, whether the system was operated by one corporation, or by a parent and subsidiary corporations.

Cases, such as Hans Rees' Sons v. State of North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879, where the court refused to approve the result reached by the formula allocation method because the part of the taxpayer's entire income apportioned to the state was not reasonably attributable to the processes conducted within its borders, are in harmony with the foregoing conclusions.

In any event, since the business transacted by the parent and its subsidiaries in the present case was a unitary business, the accident of different labels which may have attached to the various subsidiaries does not change the result. The factors by which the local branch contributed to the realization of profits to the entire business in the Butler Brothers case are likewise present in this case.

The plaintiff contends that nevertheless the application of the formula allocation produced an arbitrary and unreasonable result. The contention is based on the assertions that there was no proof by the commissioner that the formula method was proper or truly reflected the taxpayer's income; that there was no issue of tax evasion; and that, as the court found, the accounts of the plaintiff were accurate and reasonable. The court made no express finding on the reasonableness of the application of the formula method employed by the commissioner.

[7,8] The evidence on the issue of the propriety of the formula allocation method to reflect the plaintiff's income was sufficient when the unitary method of ownership, use and operation of the business of the parent and its subsidiaries was established. It was then incumbent upon the plaintiff to produce evidence to meet the burden devolving upon it to show that the formula allocation method was arbitrary and unreasonable. The plaintiff's evidence, however, consisted solely of the presentation of its separate accounting, and the accuracy and reasonableness of the entries thereof. That evidence did not overcome the correctness of each element of the formula equation, nor the reasonableness of the application thereof to ascertain net income in this case. Tax evasion is not a factor which must be present before the formula allocation method may be employed. Reliance upon the accuracy and reasonableness of the separate accounting and the entries thereof is merely an argument for the application of a different formula, namely, a "fair price" standard. The plaintiff does not establish the unreasonableness of the formula allocation method by showing the reasonableness of its book entries. Its burden is to establish affirmatively that the formula equation produces an arbitrary and unreasonable result. The plaintiff makes no contention that the percentage of the entire net income allocated to this state by the formula equation had no reasonable relation to the proportion which the total sales in California bore to the total sales of the unitary business. Its position in this respect is explainable, inasmuch as the California sales for each of the years involved amounted to more than 20 per cent of the total sales of the unitary business for that year, which was a higher percentage in each instance than that allocated to California by the commissioner. There is no necessary inconsistency between the accuracy and fairness of the taxpayer's accounting and the different result obtained by the formula method of allocating income. For taxation purposes the one does not impeach the other. Butler Brothers v. McColgan, 315 U.S. at page 507, 62 S.Ct. 701, 86 L.Ed. 991. There is therefore no evidence to support a finding, had one been made, of unreasonableness in the employment of the formula allocation method to ascertain the plaintiff's share of the income of the unitary business. On the contrary it affirmatively appears that the result from the method pursued was just and reasonable.

The Supreme Court of the United States has answered the plaintiff's constitutional objections by its holding in the Butler Brothers case, 315 U.S. at page 507, 62 S.Ct. 701, 86 L.Ed. 991; see, also, Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293, that to compute the income allocable to one state of a unitary business operated in several states by a reasonable formula method is not to tax extraterritorial values.

That the authority existed to ascertain the net income of the plaintiff on a formula allocation basis in the absence, as here, of any equity which would prevent it, is made manifest by the foregoing observations. The trial court therefore incorrectly concluded that the plaintiff was immune from the appropriate exercise of that authority.

[9, 10] It is also contended by the plaintiff that the notice of the additional tax for the taxable year 1937 was not mailed within the prescribed time. The notice was dated November 22, 1940, and it may be assumed was mailed on that date. Section 25 of the act as amended in 1933 provided that notice of additional tax must be mailed within three years after the return was filed. The return for the taxable year 1937 was filed March 15, 1937. According to the computation of the time limitation as enacted in 1933, the notice should have been mailed before March 15, 1940, and having been mailed on November 22, 1940, was mailed late. However, in 1939 the Legislature again amended section 25 to provide that the notice should be mailed within four years after the return was filed. This extension became effective before the expiration of the former three-year period for mailing notice of additional tax for the 1937 taxable year. Amendments extending statutes of limitations apply to pre-existing claims not already barred unless the amendatory act expressly otherwise provides. Davis & McMillan v. Industrial Acc. Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095. Section 21 of the 1939 Statutes (p. 2973) provided that the amendatory act, since it prescribed a tax levy for the usual current expenses of the state, should take effect immediately and should be applied in the computation of taxes accruing subsequent to December 31, 1938. The statute amended twenty sections, and added two sections to the act. The express application of the statute "In the computation of taxes accruing subsequent to December 31, 1938," referred to the tax liability as altered or modified by the 1939 statute. It did not amount to a provision or a saving clause expressly preventing application of the extended period to claims not already barred. The greater period as applied to claims not barred related to a procedural and remedial matter and it was within the power of the Legislature to extend it as to those claims. The Legislature has done so in this matter by failing expressly to provide that the extended period did not apply to claims not barred by expiration of the former period. As pointed out in the Davis case an amendment to a statute of limitations enlarging the period of time within which an action may be brought as to pending causes is not retroactive legislation and does not impair any vested right. A person has no vested right in the running of a statute of limitations until it has completely run and barred the action. Inasmuch as the time element applies solely to a method or means of collection of an existing liability of the taxpayer, it must be deemed to relate to the remedy as distinguished from the right. Thus the foregoing principles are applicable, and constitute a complete answer to the plaintiff's contentions in this respect.

It follows that the assessment of the additional tax in each case was proper.

The judgments are reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

29 Cal.2d 552

FONG CHUCK v. CHIN PO FOON et al.

S. F. 17147.

Supreme Court of California, in Bank.

Jan. 21, 1947.

1. New trial ⚷153

Notice of intention to move for new trial, served and filed prior to signing of findings of fact and conclusions of law was premature, and hence trial court never acquired jurisdiction to pass upon motion and all proceedings based thereon were void. Code Civ.Proc. § 662.

2. New trial ⚷10, 117(2)

Proceedings for new trial taken prematurely are a nullity and litigants cannot invest the court with jurisdiction to hear and determine a motion for new trial by consent, waiver or acquiescence.

3. New trial ⚷139

Plaintiff was not estopped from raising objection that notice of intention to move for new trial was prematurely filed since jurisdiction may not be conferred by estoppel when neither consent, waiver, agreement nor acquiescence will suffice.

4. Judgment ⚷340

Where trial court had no jurisdiction to grant a new trial, trial court could not vacate the judgment and enter a new and different judgment from that theretofore entered. Code Civ.Proc. § 662.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Fong Chuck against Chin Po Foon and others for specific performance of an agreement to purchase real estate. From a judgment for defendants, and from two orders made thereafter, one correcting a clerical error with regard to entry of judgment and the other refusing to vacate the judgment, the plaintiff appeals.

Judgment and the orders reversed.

Prior opinion, 165 P.2d 534.

J. H. Sapiro and Elden C. Friel, both of San Francisco, for appellant.

J. H. Brill, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff appeals from a judgment for defendants and from two orders made thereafter: one correcting a clerical error with regard to the entry of said judgment and the other refusing to vacate said judgment. The action, which was for specific performance of an alleged agreement for the sale of real property, was tried by the court without a jury. Inasmuch as certain procedural considerations affecting the jurisdiction of the court in its disposition of this case are determinative of the propriety of plaintiff's appeal, the record on its merits will not be reviewed and only the following table of dates need be noted:

May 25, 1944—judgment ordered for plaintiff and his counsel instructed to prepare findings of fact and conclusions of law.

June 13, 1944—on hearing, findings settled and their redraft ordered in accordance with rulings then made.

June 15, 1944—notice of intention to move for a new trial served and filed.

June 16, 1944—findings of fact and conclusions of law actually signed and filed, and judgment entered, decreeing specific performance as sought by plaintiff.

June 19, 1944—written notice of entry of judgment served and filed.

June 23, 1944—motion for a new trial argued and submitted for decision.

August 15, 1944—order filed setting aside the findings and judgment for plaintiff, and directing judgment for defendants upon reopening of the case. (Code Civ.Proc., sec. 662.)

September 15, 1944—judgment for defendants signed and filed.

October 24, 1944—two orders made: one denying plaintiff's motion to strike the order of August 15, 1944; and the other correcting the minutes to show that the order which was apparently entered on August 15 was in fact entered August 14, 1944.

[1, 2] Plaintiff contends that the notice of intention to move for a new trial, served

and filed prior to the signing of the findings of fact and conclusions of law, was premature; that in the absence of a timely notice, the trial court never acquired jurisdiction to pass upon the motion and therefore all proceedings based thereon are void. Plaintiff's position must be sustained. A substantially similar situation was presented in the recent case of Tabor v. Superior Court, 28 Cal.2d 505, 170 P.2d 667, where it was held that the timely filing of the notice is essential to the trial court's jurisdiction and "Proceedings for a new trial taken permaturely are a nullity and ineffectual for any purpose." 28 Cal.2d at page 507, 170 P.2d at page 669. It was further stated in the Tabor case that "It is not within the power of the litigants to invest the court with jurisdiction to hear and determine the motion for a new trial by consent, waiver, agreement or acquiescence." 28 Cal.2d at page 507, 170 P.2d at page 669.

[3] Defendants apparently argue for a re-examination by this court of the rule established by Tabor v. Superior Court, supra, and the authorities cited therein. However, this court gave full consideration to the matter as evidenced by its statement in the Tabor case, 28 Cal.2d at page 509, 170 P.2d at page 669, that "The adoption of any other rule could lead to endless confusion," and that adherence to the established rule was preferable despite the fact that it "May lead to harsh results in certain cases." Defendants further argue that plaintiff should be estopped from raising the objecion that the notice was prematurely filed, but as the objection has been held to be one going to the jurisdiction of the trial court, we do not believe that jurisdiction may be conferred by estoppel when neither consent, waiver, agreement, nor acquiescence will suffice. 21 C.J.S. Courts, § 108, p. 161; see Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 331, 334, 187 P. 1056; Amos v. Superior Court, 196 Cal. 677, 681, 239 P. 317; Kegley v. Kegley, 16 Cal.App.2d 216, 220, 60 P.2d 482; Estate of Davis, 38 Cal.App.2d 579, 582, 101 P.2d 761, 102 P.2d 545.

[4] It is apparently conceded that if the trial court did not have jurisdiction to grant a new trial, it had no jurisdiction to act under section 662 of the Code of Civil Procedure, which section gives the trial court certain additional powers when ruling upon a motion for a new trial. Since we have concluded that the trial court did not have jurisdiction to grant a new trial, it necessarily follows that the trial court had no power to vacate the judgment and to enter a new and different judgment from that theretofore entered.

The judgment and the orders appealed from are reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

AARONS v. BOARD OF MEDICAL EXAMINERS et al.*

Civ. 13253.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1947.

Hearing Granted March 27, 1947.

Physicians and surgeons 🔑4

The granting of reciprocity certificates to nine doctors who were graduates of medical school which had been disapproved by Board of Medical Examiners did not constitute a de facto approval of school so as to entitle graduate of such school to take written examination for license to practice medicine. Business and Professions Code, §§ 2190–2195, 2280–2293.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandate proceeding by Zelwyn A. Aarons against the Board of Medical Examiners of the State of California to compel the respondent to permit the petitioner to take a written examination looking to the issuance of a license to practice medicine and surgery. Judgment for the petitioner and the respondent appeals.

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* Subsequent opinion 187 P.2d 8.

Judgment reversed with direction to dismiss the proceeding.

Robert W. Kenny, Atty. Gen., State of California, and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Lionel Browne, of San Francisco, for respondents.

GOODELL, Justice.

This case is a companion to the cases of Mann v. Board of Medical Examiners, etc., et al., Cal.App., 176 P.2d 708 and Burroughs v. Board of Medical Examiners, etc., et al., Cal.App., 176 P.2d 715. All three were tried together and on the same record. Each of them is an appeal from a judgment in a mandate proceeding.

In the Mann and Burroughs cases applications for direct reciprocity certificates to practice medicine and surgery were denied and the Superior Court by a peremptory writ directed the board to grant them.

This case differs from the other two, in that the respondent applied only for the right to take a written examination looking to the issuance of a license to practice medicine and surgery. His application was denied and he obtained a peremptory writ directing that an examination be given. From that judgment the board took this appeal.

The respondent's case, unlike the other two, was not based on the reciprocity provisions of the medical practice act, nor could it have been, for the reason that he never had been admitted to practice anywhere. His application was filed under that part of the act entitled "The Physician's and Surgeon's Application" (sections 2190–2195, Business and Professions Code) and "Examinations" (sections 2280–2293).

The respondent graduated from Chicago Medical School with the degree of doctor of medicine in 1944 after a four-year course in medicine and surgery. He testified before the board that he was then, in July, serving his internship in Mary's Help Hospital in San Francisco, which would not be completed until the following September.

On July 10, 1945, after an informal hearing before the board (as in the Mann case) the board made its order denying the application on the same ground as that stated in the Mann and Burroughs cases.

This case was tried on the same theory as that on which the other two cases were presented, namely, that the granting of reciprocity certificates to nine doctors who were graduates of respondent's school amounted to a nullification of any formal action taken by the board disapproving the school, and a de facto approval of the school and that therefore the requirement of the statute had been met. In the Mann opinion, where the facts common to all three cases are stated, that question is fully discussed.

The court's findings were substantially the same as those in the Mann case. As this case depends entirely on the finding that the school had been approved, which finding is held in the Mann case to have been unsupported by the evidence, the judgment herein must be reversed for the reasons given and on the authorities cited in the Mann opinion.

Everything said in the Mann opinion respecting further proceedings or other remedies open to respondent applies with equal force to this case.

The judgment is reversed with the direction to the Superior Court to dismiss the proceeding.

NOURSE, P. J., and DOOLING, J., concur.

MANN v. BOARD OF MEDICAL EXAMINERS et al.*

Civ. 13254.

District Court of Appeal, First District.
Division 2, California.
Jan. 30, 1947.
Rehearing Denied March 1, 1947.
Hearing Granted March 27, 1947.

1. Physicians and surgeons 🔑5(1)

A candidate for reciprocity certificate to practice medicine may be admitted without examination only if he measured up in his own state to California's requirements for practice of medicine, and if he did not, he must submit to an examination. Business and Professions Code, §§ 2310, 2320.

2. Physicians and surgeons 🔑5(1)

The granting of reciprocity certificates for practice of medicine to nine graduates of medical school which had been disapproved by Board of Medical Examiners did not constitute de facto approval of school so as to entitle graduate of school, who had been admitted to practice of medicine in three other states, to a reciprocity certificate without an examination, particularly where seven of the nine had taken an examination. Business and Professions Code, §§ 2168.5, 2171, 2190–2195, 2310–2325.

3. Mandamus 🔑172

In proceeding to compel Board of Medical Examiners to issue reciprocity certificate to practice medicine to applicant who was graduated from unapproved medical school, reviewing court, which had considered nine specific cases in which graduates of that school had been admitted, would not consider cases shown by official directory of many other doctors admitted to practice who were graduates of medical schools now non-approved, extinct or merged with other schools. Business and Professions Code, §§ 2310, 2320.

4. Mandamus 🔑168(2)

In mandate proceeding to compel issuance of reciprocity certificate to practice medicine to applicant who was graduated from an unapproved medical school, the applicant had burden of proving his eligibility under statute. Business and Professions Code, §§ 2310, 2320.

5. Physicians and surgeons 🔑5(1)

In determining whether applicant for reciprocity certificate to practice medicine was a graduate of an approved medical school, directory of Board of Medical Examiners listing recognized schools in black face type and listing other schools, including applicant's school, in light face type with designation indicating that school was generally unapproved did not indicate approval of school. Business and Professions Code, §§ 2310, 2320.

6. Mandamus 🔑168(3)

In mandate proceeding to compel issuance of reciprocity certificate to practice medicine to applicant who was graduate of unapproved medical school, resolution of Board of Medical Examiners disapproving school for second time was improperly excluded on ground that resolution had not been called to board's attention at informal hearing which board accorded to applicant. Business and Professions Code, §§ 2310, 2320.

7. Mandamus 🔑168(4)

In proceeding to compel issuance of reciprocity certificate to practice medicine to applicant who was graduate of unapproved medical school, evidence in support of applicant's contention that action of Board of Medical Examiners amounted to a de facto approval of school should be clear, convincing and unequivocal. Business and Professions Code, §§ 2310, 2320.

8. Mandamus 🔑168(4)

In proceeding to compel issuance of reciprocity certificate to practice medicine to graduate of unapproved medical school, evidence of resolutions of Board of Medical Examiners disapproving school and that board's directory did not list school under list of recognized schools established disapproval of school. Business and Professions Code, §§ 2310, 2320.

9. Mandamus 🔑168(4)

An applicant for reciprocity certificate to practice medicine who failed to establish that medical school from which he was graduated was on approved list did not sustain his burden of proof of his eligibility for certificate. Business and Professions Code, §§ 2310, 2320.

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* Subsequent opinion 187 P.2d 1.

10. Mandamus ⚷172

In proceeding to compel issuance of reciprocity certificate to applicant who was graduate of unapproved medical school, comparison of applicant's experience and attainment with those of other graduates of same school who had been admitted in California was irrelevant, since applicant was not entitled to admission unless school had been approved. Business and Professions Code, §§ 2310, 2320.

11. Mandamus ⚷187(10)

Where applicant seeking to compel issuance of reciprocity certificate to practice medicine based his case on contention that there had been de facto approval of his medical school by Board of Medical Examiners so that he was entitled to certificate without examination, reviewing court would not remand case with leave to amend setting forth right to an examination, since such a claim was inconsistent with that originally pleaded. Business and Professions Code, §§ 2174, 2310, 2320.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandate proceeding by Nathan Mann against the Board of Medical Examiners of the State of California to compel the board to issue a reciprocity certificate entitling him to practice medicine and surgery. From a judgment for the petitioner, the respondents appeal.

Judgment reversed with direction to dismiss the proceeding.

Robert W. Kenny, Atty. Gen., State of California, and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel and Louis Heilbron, all of San Francisco, for respondents.

GOODELL, Justice.

The respondent brought a mandate proceeding in the Superior Court to compel the appellant board to issue a reciprocity certificate entitling him to practice medicine and surgery in this state, after the board had denied his application. Following a court hearing, characterized by respondent's counsel as "bitter and stormy", a peremptory writ was ordered as prayed. This appeal was then taken.

There are two companion cases. Dr. Oscar J. Burroughs also applied directly for a reciprocity certificate, while Dr. Zelwyn A. Aarons applied for an examination. Their applications were likewise denied, and they, too, sought and obtained writs of mandate. The three cases were tried together and on one record. The Burroughs and Aarons cases are discussed in separate opinions this day filed. Burroughs v. Board of Medical Examiners, etc., Cal.App., 176 P.2d 715; Aarons v. Board of Medical Examiners, etc., Cal.App., 176 P.2d 706.

The respondent studied medicine in Chicago Medical School from 1932 to 1936 and graduated with the degree of doctor of medicine in 1936. He served for a year as an intern in a Chicago hospital and was admitted to practice in Illinois in 1937. The same year, after a written and practical examination, he was admitted in Massachusetts, and in 1940, after a written examination, he was admitted in Texas. In 1940 he applied unsuccessfully in California for a direct reciprocity certificate; in 1941 he applied to take an examination, but was refused.

In April, 1945, respondent filed his second application for a direct reciprocity certificate, based on his Illinois license. On such an application the law does not call for a hearing before the board but in this case a hearing was requested and granted.

Ever since 1913 the medical practice act has required that every applicant in California be a graduate of a medical school approved by the board.

The medical school from which the respondent graduated was disapproved by the board by a resolution appearing on its minutes of February 18, 1924, and its action has never been rescinded of record.

To surmount this barrier counsel for the respondent at the board hearing drew to the board's attention the fact—disclosed, of course, by its own records—that (despite such formal disapproval) at least seven graduates of the same school had been granted reciprocity certificates by the board.

On July 10, 1945 respondent's application was denied "upon the ground that he has not shown to the satisfaction of this Board compliance with section 2171 of the Business and Professions Code, in that he has failed to establish that he completed a resident course of professional instruction at a school approved by this Board."

The petition in mandate was then filed, wherein it was alleged that the school had been approved by the board; that the board's records so showed; that there was no evidence to the contrary, and that the application had been capriciously denied. It was alleged "that many of its graduates were admitted to practice in California under direct reciprocity and without the necessity of taking any written or oral examination for licensure in this State." It was alleged also that there never had been any pretense that between the time of the former approval of the school, "by either the act of admitting its graduates to practice * * * or otherwise, * * * and the time of petitioner's graduation therefrom, there was any deterioration in the quality of its instruction or a later investigation into the character and standards of its teachings, and that said Board's action was hence unreasonable, arbitrary, and constituted an abuse of discretion, and was in excess of its jurisdiction."

The board denied these allegations and affirmatively pleaded that it had not approved the school but on February 18, 1924 and again on June 30, 1927 had disapproved it, which actions had never been revoked.

The court found that the school at the time of petitioner's attendance and graduation was approved by the board and at the time he was admitted in "Illinois, Massachusetts and Texas, the requirements of the medical licensing authorities of said states were not in any degree or particular less than those required for the issuance of a similar certificate" in California.

The theory on which the mandate proceeding was commenced as shown by the pleadings, the record, and the findings therein, and the theory of the respondent on this appeal, is that what the board *did* in admitting nine graduates of the same school outweighed and nullified what it *said* in the resolutions of disapproval and *amounted to de facto approval of the school.*

The codification into the Business and Professions Code (Stats. 1937, p. 1229) is based on the medical practice act of 1913, as amended. The subjects "The Physician's and Surgeon's Application" (sections 2190–2195) and "Examinations" (sections 2280–2293) were formerly contained in sections 2, 2d, 9, 10, 11, 11a and 23 of the act. The subject "Reciprocity" (sections 2310–2325) was contained in section 13 of the act.

Except for the addition in 1943 of sections 2168.5 and 2316.5 the reciprocity part of the act (as far, at least, as the question here presented is concerned) has not been materially changed since 1913.

One of the provisions which differentiates the reciprocity part of the act from other parts relating to licenses is the requirement that reciprocity candidates shall be admitted *without examination.* A doctor from any of the other 47 states is admitted in California simply on his license issued by the other state, augmented by a showing respecting his educational qualifications.

In the period from 1922 to 1945, during which the nine doctors were admitted in California, the law read substantially as it now reads in the following sections: Section 2310: "The board *shall* issue a reciprocity certificate to an applicant to practice a system or mode of treating the sick or afflicted in this State that he is authorized to practice in any other State if it is a system or mode that is recognized by this chapter or any preceding practice act. Subject to the provisions of sections 2320 and 2321, *no examination for any reciprocity certificate shall be required*". (Emphasis added.)

The qualification found in the last sentence naturally directs the inquiry to section 2320, which reads as follows: "The board may make an independent investigation of the *educational qualifications* and the character, ability and standing of the applicant. If, after this investigation and any other or further examination or investigation which the board may see fit to make on its own part, *it is found that the requirements of the medical licensing au-*

thority issuing his certificate were in any degree or particular less than the requirements provided by the law of this State at the date of the issuance of his certificate, * * * *he will not be entitled to practice in this State without examination".* (Emphasis added.)

Section 2321 provides that if the out-of-state license is more than 10 years old the candidate must take an oral examination.

[1] When sections 2310 and 2320 are read together they must necessarily mean that if the candidate measured up, in his own state, to California's requirements—one of which is graduation from a school approved by the California board—then he should be admitted without examination, but if he did not, he must submit to an examination. The fact that an examination is called for must necessarily mean that the requirements of the other state have been found to be below those of California. Certification *after an examination so required* cannot possibly amount to approval of the applicant's school.

[2] The certification in California of nine graduates of respondent's school is relied on to establish his claim of *de facto* approval of it. *Seven of the nine were admitted in California only after they had been subjected to examination.* Their histories follow:

Dr. E. M. F. graduated in 1917. He was admitted in California *after an oral examination* in 1922, 16 months before the 1924 resolution disapproved his school. The minutes show that the board ruled in his case: "that reciprocity certificate be issued [to E. M. F.], based upon his certificate issued by the Illinois Board, when considered in conjunction with the granting of a First Lieutenant's commission in the Medical Corps of the United States Army after an oral examination, followed by service in the A. E. F." His case should fall of its own weight because he was admitted before the board took formal action disapproving the school. At least it cannot be claimed in his case that the board impliedly approved the school *after* it had formerly disapproved it.

Dr. W. F. R. graduated in 1912. He was granted a reciprocity certificate in 1927 after his application had been once denied. That he was forced to take the examination not because he held a stale license, but because the board had found his out-of-state grounding below California standards appears from the following minutes of the board: "Dr. R. when informed of the *denial* of his application, signified his intention of filing a *new* application, *outlining his additional work, and coming under the oral provisions of the law."* (Emphasis added.)

Dr. A. M. graduated in 1916. In 1923 his first application for a reciprocity certificate in California was denied because (as the minutes show) of the "low standard" of his school. In 1929, when he argued his case before the board, he was an army captain on duty in a government hospital at San Fernando. The minutes show that he filed "various documents to supplement his application. One document was listed as Complete Military Record, including Citation for Bravery under heavy gas bombardment in St. Mihiel Sector." He was granted a reciprocity certificate in 1929 *after taking an oral examination.*

Dr. H. C. S. graduated in 1927 and his application that year was at first denied. On reconsideration he was permitted to take a written examination, *which he failed to pass.* In 1934 he was admitted *after taking an examination.*

Dr. J. A. M. graduated in 1934 and was admitted in 1935 *after taking a written examination.*

Dr. D. E. A. graduated in 1928 and was granted a reciprocity certificate in 1941. From the record it would appear that his examination was required because of deficient grounding, for he took a *written* examination.

Dr. H. L. D. graduated in 1926. He applied to the board in 1943 for an examination looking to the issuance of a reciprocity certificate. He had a hearing before the board attended by his counsel, and the board denied an examination. In 1944, he filed in the Superior Court a petition entitled "Petition for writ of mandate or other appropriate relief pursuant to section 2174 of the Business and Professions Code of California". Section 2174 provides an applicant a remedy where a school has been *disapproved.* The fact that he invoked this remedy plus the fact that he sought before the board and in court *only the right to take an examination* indicates that he knew the Chicago Medical School was not approved by the board and that it would be futile to seek a reciprocity certificate outright. The court mandated the board to give him an examination. It obeyed and he passed. We fail to see how his certification under the compulsion of the writ and in the peculiar circumstances of this case can be seriously urged as *de facto* approval of the school.

Dr. E. W. S. graduated in 1916. In *1920* his application for a reciprocity certificate was denied on the ground (according to his pleading, in evidence here) that the institution from which he graduated "did not appear on the list of schools as qualifying petitioner for a license to practice in the State of California." (The board in 1923, as appears earlier, had denied the application of Dr. A. M., who likewise had graduated in 1916, because of the "low standard" of the school). In 1944, *twenty-four years after his application had been denied,* he filed a petition in the Superior Court for a writ of mandate. The judgment therein declares "that the then Board of Medical Examiners were without jurisdiction to deny petitioner's application for a physician's and surgeon's certificate by direct reciprocity and without examination and that it is now the duty of Respondent Board, as successor to the then Board, to correct such old Board's mistake * * *" It mandated the board to annul the 1920 order and to issue Dr. S. a reciprocity certificate. The board did so under the compulsion of the writ. As in the preceding case, we fail to see how the board's action in such circumstances can be characterized as inconsistent, or held to be an approval of the school.

Finally, Dr. A. O. T. graduated in 1923 and was admitted in 1925 *without examination* as far as the record shows by a resolution reading: "Moved by Dr. Campbell, seconded by Dr. Brown, that a reciprocity certificate be issued to [A. O. T.]"

The cases of Dr. A. O. T. and Dr. E. W. S. are the only ones of the nine where there was reciprocity certification without examination in the period of 23 years from 1922 to 1945, as far as the record shows.

Counsel for respondent with commendable candor concede that "the admission of one or two applicants from the school might be subject to the contention that the Board was guilty of an error in slighting its statutory obligation". The leeway thus frankly conceded just about squares with what this record shows except that in the case of Dr. E. W. S. there was no oversight on the board's part—it *denied his application* in 1920 and was forced to reverse its action by court order 24 years later. In his case, moreover, the court conceivably might have based its mandate on the fact that in 1920 when the board rejected his application it had not yet formally disapproved his school.

Throughout this discussion we have dealt with nine doctors only. Counsel for respondent state that six other graduates were admitted in California and are shown in the board's directory, making 15 in all. Before the board the records of but seven doctors were brought up, and in the trial court the histories of no more than nine were discussed. We therefore feel under no obligation to go further respecting the other six in the absence from the record of their individual histories.

[3, 4] Again, it is argued by the respondent that the official directory shows over 1000 doctors admitted and practicing in California who are graduates of medical schools now nonapproved, extinct or merged with other schools. Although the directory is properly before the court and its contents are in the record, the nine specific cases which were before the trial court are as many as we can be expected, within reason, to consider. The burden of proof, after all, was on the respondent.

[5] The respondent also contends that an approval of the school is to be implied from the wording of the board's director-

ies. Instead of approval, the directories, in our opinion, definitely show disapproval. The 1945 directory contains a list of medical schools both existing and extinct. It announces that "Existing recognized schools are in black face type. Schools in light face type are extinct, have merged with other schools or are not recognized". Under Illinois, 45 schools are listed. Five of these are shown in black face type, meaning approved. Of the remaining 40, 16 — *including the school in question* — are listed not only in light face type but with the designation "Reported not acceptable for licensure by many of the State Licensing Boards, or not approved as a medical school by the Council on Medical Education of the American Medical Association." This certainly does not indicate approval.

[6] At the trial the board offered in evidence its minutes of June 30, 1927, wherein by resolution the board disapproved the school for the second time. The respondent objected that the resolution had not been called to the board's attention or introduced in evidence, so to speak, at the informal hearing which the board accorded to respondent and the objection was sustained. We have no doubt that the ruling was erroneous. The resolution was contained in the board's minutes and was certainly within its own knowledge. Anderson v. Board of Dental Examiners, 27 Cal.App. 336, 339, 149 P. 1006; Benton v. Industrial Acc. Comm., 74 Cal. App. 411, 415, 240 P. 1021; Rich v. McClure, 78 Cal.App. 209, 213, 248 P. 275. The principal, if not the only, question in the case was whether there had been approval or disapproval of the school. The resolution tended to disprove respondent's allegations and to prove those of appellant on that issue. The first resolution, of February 18, 1924, had been admitted and the second resolution was just as admissible as the first.

These resolutions showed two formal actions by the board disapproving the school. Opposed to this documentary proof were the histories of the nine graduates which we have discussed at considerable length and which, in our opinion, add up to no showing whatever of approval.

[7, 8] Manifestly such formal and deliberate actions of the board, to whom the legislature has committed the important duty and function of approving or disapproving medical schools, should not be subject to nullification by less formal or deliberate action except by the strongest kind of showing. The evidence relied on to establish such nullification should be clear, convincing and unequivocal. Such proof was not forthcoming in this case, and we are constrained to hold that there is no substantial evidence in this record to sustain the findings that the school had been approved; that the requirements of Illinois, Massachusetts and Texas equalled California's or that many of the school's graduates were admitted "under direct reciprocity and without the necessity of taking any written or oral examination". The finding of arbitrary, capricious and unreasonable board action is dependent, of course, on the finding that the school had been approved.

The evidence, on the contrary, establishes that the school had been definitely disapproved.

[9] The medical practice act sets up a series of conditions precedent to the issuance of a certificate and the respondent did not prove his compliance therewith, which means, in short, that he did not sustain his burden of proof. Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319.

The case of Herzig v. Board of Medical Examiners, 135 Cal.App. 41, 26 P.2d 513, 514 is in point. In that case the doctor's petition in mandate was denied because his medical school had been disapproved by the same resolution—that of February 18, 1924—which disapproved the Chicago Medical School. In that case, as in this, the admission of other graduates was claimed to be an approval. In the main opinion this contention is not even mentioned, but in the concurring opinion Mr. Justice Conrey says: "Some evidence was introduced to show that certain reciprocity certificates to holders of diplomas from those institutions were granted by respondent board after February 18, 1924. In most of those instances, if not all, evidence was introduced to show that these exceptions were justified by the particular circumstances of those cases; as for instance, when it appeared that a diploma was issued in 1892, whereas the resolution refusing recognition was by its terms effective only as against certificates issued in 1907 and thereafter. I think that these particular instances were not sufficient to overcome the effect of the formal resolutions adopted and maintained in force by respondents."

Cases from outside jurisdictions are cited in the briefs where admissions were claimed to overcome formal board action, and to amount to recognition of the school. It is not necessary to discuss them because of the authority in our own state.

The respondent in the trial court strenuously contended, and so contends on appeal, that the board's action was arbitrary, capricious, discriminatory, and violated his constitutional rights. In that connection he quotes from Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 40, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750, the familiar statement that "The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured". However true that is, it must be borne in mind that that language was used with respect to a license which had been already issued and was outstanding not one which was then only applied for.

In Re Investigation of Conduct of Examination for Admission to Practice Law, 1 Cal.2d 61, 63, 67, 33 P.2d 829, 830, the court, after commenting on the "mistaken conception" that there exists "a 'vested right' to practice law", says, "It has been the rule in this state, * * * that 'The right to practice law is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature.' Cohen v. Wright, 22 Cal. 293, 319 * * *."

That declaration of course applies with equal force to the right to practice medicine.

[10] Much time was consumed at the trial in attempting to show caprice and discrimination by a comparison of the individual experience—army, public health, general practice and otherwise—of the same nine graduates of respondent's school, with his own experience and attainments, to the advantage (it is argued) of the respondent. Such comparison was not within or at all relevant to the issue on trial. That issue was not whether Dr. Mann was better qualified or more experienced than any of the nine who had been admitted, but whether, as a matter of right, he was entitled to a certificate without examination on the ground that the board had approved his school. As we emphasized at the outset, that, and that alone, was the issue in this case.

[11] The respondent complains that the board "does not even offer him an examination to test his qualifications. Assuming that the Board has not approved this school, despite the contradiction of what it has done in the past with what it has said, nonetheless the Board's action at the very worst should have been only that it refused him admission without examination." This is accompanied by the suggestion that in case of an adverse holding this court should order an examination.

Respondent's petition in mandate does not ask for an examination and the record does not indicate that when he was before the board he sought one. His position is essentially the same as that of the petitioner in the leading case of Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 234, 32 L.Ed. 623, where the court, through Mr. Justice Field, said, "It [the statute] authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. *But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient.*" (Emphasis added.)

This state has provided a remedy for an applicant in the position in which the respondent found himself. Section 2174 (Business and Professions Code) provides that, "If any school is disapproved by the board or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court against the board to compel it to approve the school or to admit the applicant to examination or for any other appropriate relief. In such an action, the court has full power to investigate and decide all facts anew without regard to any previous determination by the board. The action shall be speedily determined by the court and shall take precedence over all matters pending therein except criminal cases, applications for injunction, or other matters to which special precedence may be given by law."

The respondent disregarded this remedy, then and now open to him, when he elected to go from the board to the court to compel certification without examination. To follow respondent's suggestion and remand this case with leave to amend would invite the pleading in the same case, of a cause of action diametrically opposite to and inconsistent with that pleaded in the original petition. The whole theory would have to be changed from the present one predicated on approval by the board to one based on disapproval. Moreover, in order to amend, further proceedings would doubtless be required before the board (see 16 Cal.Jur., p. 861, sec. 61), as a foundation for action either under section 2174 or under any other proceeding or remedy which the respondent might choose to pursue and we cannot anticipate the board's action on any new application.

Other points raised by the appellant, such as the claimed errors in rejecting proffered evidence, including that relating to practicing without a license, need not be passed on in view of the conclusion at which we have arrived.

The judgment is reversed with the direction to the Superior Court to dismiss the proceeding.

NOURSE, P. J., and DOOLING, J., concur.

BURROUGHS v. BOARD OF MEDICAL EXAMINERS et al.*

Civ. 13255.

District Court of Appeal, First District,
Division 2, California.
Jan. 30, 1947.
Hearing Granted March 27, 1947.

Physicians and surgeons 🔑5(1)

The granting of reciprocity certificates to nine doctors who were graduates of unapproved medical school did not constitute de facto approval of school so as to entitle graduate of school who had been admitted in another state to reciprocity certificate to practice medicine.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandate proceeding by Oscar J. Burroughs against the Board of Medical Examiners of the State of California to compel the issuance of a reciprocity certificate to practice medicine and surgery. From a judgment for the petitioner, the respondents appeal.

Judgment reversed with direction to dismiss the proceeding.

Robert W. Kenny, Atty. Gen., State of California, and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Richard M. Lyman, Jr., of Oakland, for respondents.

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* Subsequent opinion 187 P.2d 9.

GOODELL, Justice.

This case is a companion to the cases of Mann v. Board of Medical Examiners, etc., et al., Cal.App., 176 P.2d 708 and Aarons v. Board of Medical Examiners, etc., et al., Cal.App., 176 P.2d 706. All three were tried together and on the same record. Each of them is an appeal from a judgment in a mandate proceeding.

In this, as in the Mann case, an application for a direct reciprocity certificate to practice medicine and surgery in this state was denied by the board, and the Superior Court by a peremptory writ directed the board to grant it. In the Aarons case the application was only for the right to take a written examination looking to the issuance of a physician's and surgeon's license which application was denied, and he obtained a peremptory writ directing that an examination be given.

Dr. Burroughs graduated from Chicago Medical School with the degree of doctor of medicine in 1939 and after serving for a year as an intern he was admitted to practice medicine and surgery in Illinois in 1941. His application in California in 1945 under the reciprocity sections, was based on his Illinois license.

On October 13, 1945 the board denied his application on the same ground as that stated in the Mann and Aarons cases.

This case was tried on the same theory as that on which the other two cases were presented, namely, that the granting of reciprocity certificates to nine doctors who were graduates of respondent's school amounted to a nullification of any formal action taken by the board disapproving the school, and a de facto approval of the school and that therefore the requirement of the statute had been met. In the Mann opinion, where the facts common to all three cases are stated, that question is fully discussed.

The court's findings although shorter than those in the Mann case, came to the same result. As this case depends entirely on the finding that the school had been approved, which finding is held in the Mann case to have been unsupported by the evidence, the judgment herein must be reversed for the reasons given and on the authorities cited in the Mann opinion.

Everything said in the Mann opinion respecting further proceedings or other remedies open to respondent applies with equal force to this case.

The judgment is reversed with the direction to the Superior Court to dismiss the proceeding.

NOURSE, P. J., and DOOLING, J., concur.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. PAYNE.

Civ. 13121.

District Court of Appeal, First District,
Division 1, California.

Jan. 27, 1947.

Hearing Granted March 27, 1947.

1. Constitutional law ⚷107
Limitation of actions ⚷4(2)

While Legislature may lengthen or shorten period of limitation it cannot, in doing so, impair vested rights, and if cause of action is not barred, limitations thereon may be shortened provided reasonable time for enforcing the right is allowed.

2. Statutes ⚷190
Taxation ⚷589

The section of the Unemployment Insurance Act relating to time within which Employment Stabilization Commission could bring an action, as it was enacted in 1939, is unambiguous and it permits a suit for collection of unemployment contributions outside the period prescribed by limitation statute contained in Code of Civil Procedure regardless of intent of taxpayer, where no return has been filed. Gen. Laws, Act 8780d, § 45.2; Code Civ. Proc. § 338, subd. 1.

3. Constitutional law ⚷53

The right to construe a pre-existing statute belongs to the judiciary, which cannot be forced to construe such statute in accordance with legislative interpretation, although Legislature has a right to define terms of a statute for the future.

4. Constitutional law ⚷186

The Legislature cannot revise the operation of an existing law in form of an amendatory statute to affect past transactions.

5. Appeal and error ⚷1008(1)
Limitation of actions ⚷6(10)

Any effect which can be given to legislative intent to affect existing causes of action for recovery of delinquent contributions due under Unemployment Insurance Act by the 1943 amendment respecting limitations, where no contribution report has been filed, has no application until a reasonable time has passed, and trial court's determination of what constitutes a reasonable time will not be reversed unless it can be said that its conclusion is an abuse of discretion. Gen.Laws, Act 8780d, § 45.2; St. 1943, p. 3054, § 4.

6. Limitation of actions ⚷6(10)

Where original act removed bar of limitations from action to recover delinquent contributions under Unemployment Insurance Act if no contribution report had been filed, and 1943 amendment made removal of the bar contingent on intent to evade the tax, trial court's finding that a delay of nearly seven months after assessment and nearly six months after amendment became effective was an unreasonable delay in filing the action, precluding recovery of assessments by the Employment Stabilization Commission, was not an abuse of discretion. Gen.Laws, Act 8780d, § 45.2; St. 1943, p. 3054, § 4; Code Civ.Proc. § 338, subd. 1.

PETERS, P. J., dissenting.

Appeal from Superior Court, San Francisco County; Edmund P. Morgan, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly Unemployment Reserves Commission, against William E. Payne, individually and doing business as Waldorf Beauty Shop No. 2, to recover unemployment insurance taxes. From an adverse judgment, plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., State of California, Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Fabian D. Brown, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment rendered in favor of defendant and respondent in an action instituted by appellant commission on January 25, 1944, for the collection of unemployment contributions and interest from the respondent for the period from January 1, 1937, to September 30, 1938, in the sum of $294.58 contributions, plus interest. Defendant's answer set up the defenses of the statute of limitations (Code Civ.Proc. sec. 338, subd. 1) and also the defense of estoppel. The trial court found in favor of defendant and respondent as to both defenses, and appellant upon this appeal contends that the court erred in making said findings.

Before discussing the legal issues involved we shall give a brief summary of the factual situation as shown by the record.

During the years 1936 and 1937 respondent was the proprietor of Waldorf Beauty Shop No. 2, located in San Francisco. It is apparent that, under the terms of the Unemployment Insurance Act, Gen.Laws, Act 8780d, respondent, if an employer of eight or more people, would be obliged to make deductions from the salary of each employee—amounting to 9/10 of 1%—for contribution to the insurance fund. During the year 1937, respondent had seven admitted employees, and he also retained a janitor, W. B. Markee, under a contract dated in December, 1936, pursuant to the terms of which Markee performed janitorial services in Waldorf Beauty Shop No. 2 during 1937.

It is apparent from the record that respondent filed no contributions returns for the year 1937—such being on the theory that he did not, during that year, have eight employees—but only seven employees and an independent contractor (janitor Markee)—and, for that reason, was not within the "contributions" provisions of the statute. It was stipulated that respondent's failure to file returns for 1937 was not due to his bad faith or intent to evade the statute.

"Sometime around July" of 1938, respondent was visited by one of appellant's auditors for the purpose of conducting an audit of respondent's books for the year 1936. At the time of such audit, respondent inquired of the auditor concerning his (respondent's) status as an employer (of eight or more) during 1937. The auditor was shown the contract with Markee—for Markee's 1937 janitorial services—and the auditor informed respondent that he was not liable for unemployment insurance contributions for 1937, "on the theory that [he] did not have eight employees." During 1937, respondent had made the necessary payroll deductions from his employees, and, after receiving that advice from appellant's auditor, and "at his instance," respondent refunded to his employees the deductions he had made from their salaries.

On November 17, 1942, an additional assessment was levied upon respondent on the theory that Markee was actually an employee during the period in question (apparently from January 1, 1937, to September 30, 1938), and respondent filed a petition for reassessment. The matter was heard before a commission referee in March, 1943, and the levy was affirmed on the theory that Markee was an employee during 1937. The transcript of that proceeding before the referee was before the court below as plaintiff's Exhibit 2. Respondent appealed directly to the commission, which, on July 1, 1943, affirmed the reassessment. This action (to recover on that reassessment) was filed on January 25, 1944.

We shall first discuss the contention of appellant that the trial court erred in holding that appellant's cause of action was barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure, which provides for a three year limitation upon "an action upon a liability created by statute, other than a penalty or forfeiture."

It seems clear that prior to September 19, 1939, the provisions of section 338, subdivision 1, of the Code of Civil Procedure, imposed a three year limitation upon the state's right to sue for delinquent unemployment insurance contributions. California Emp., etc., Comm. v. Smileage Co., 68 Cal.App.2d 249, 156 P.2d 454. Appellant concedes this to be true for the reason that the original act (Stats.1935, Chap. 352) contained no specific limitations period. By a 1939 amendment of the act, section 45.2 was thereto added. That section provided as follows: "No statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if with respect to such contributions no return has been filed." Stats.1939, Chap. 630, sec. 6, p. 2053.

It is conceded that respondent herein never filed a return upon the contributions concerned in this action. Under the 1939 amendment above noted, then, section 338, subdivision 1 of the Code of Civil Procedure, would not be available to respondent, no return having been filed by him. However, by a 1943 amendment to section 45.2 (Stats.1943, Chap. 1114, sec. 1, p. 3054) that limitations provision was changed to read as follows: "No statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if by reason of any intent to evade the provisions of this act no contribution report or an erroneous return has been filed."

It should be here noted that it was stipulated that respondent's failure to file returns for the period here involved was not due to bad faith or any intent to evade the statute.

By section 4 of Chapter 1114 (Stats. 1943), the Legislature provided further:

"The amendment made by Section 1 of this act to Section 45.2 of the Unemployment Insurance Act is hereby declared to be merely a clarification of the original intention of the Legislature, rather than a substantive change, and such section shall be construed for all purposes as though it had always read as hereinabove set forth."

The 1943 amendment to section 45.2 became effective on August 4, 1943. It is admitted by appellant that the commission affirmed the reassessment (on the basis that Markee was an "employee") on July 1, 1943.

[1] Appellant argues that the 1943 amendment to section 45.2 created a new statute of limitation on the state's right to collect delinquent contributions—i. e., where, prior to that amendment, section 338, subdivision 1, of the Code of Civil Procedure would not apply when no return had been filed, it would apply thereafter even where no return had been filed, providing the failure to file was not coupled with an intent to defraud. Appellant contends that the 1943 amendment to section 45.2 cannot constitutionally operate to cut off the right of action afforded under the 1939 addition of 45.2 (no limitation where no return filed) unless appellant be afforded the right, within a reasonable time after the effective date of the 1943 amendment, to sue under the limitation as enacted in 1939. Appellant relies upon an unbroken line of authority to the effect that, while the Legislature has the right to lengthen or shorten periods of limitation, it cannot, in doing such, impair vested rights; and, if a cause of action is not barred, limitations thereon may be shortened, provided that a reasonable time for enforcing the right is allowed. Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673; Bank of America Nat. Trust & Sav. Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296; In re Estate of Whiting, 110 Cal.App. 399, 294 P. 502; 17 R.C.L. 676; Kozisek v. Brigham, 169 Minn. 57, 270 N.W. 622, 49 A.L.R. 1263; Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520, 120 A.L.R. 758. In Coleman v. Superior Court, supra [135 Cal.App. 74, 26 P.2d 675], it is said: "* * * the cases universally support the conclusion that a statute which purports to bar an existing right, without giving reasonable time for its exercise, cannot be upheld, nor can such statutes be applied to existing rights." And in Bank of America Nat. Trust & Sav. Ass'n v. Dennison, supra [8 Cal.App.2d 173, 47 P.2d 297], the court said: "It is recognized as a fixed rule that no one has a vested right in the statute of limitations until it has run in his favor, and that if a cause of action is not barred the Legislature may shorten or extend the time within which it may be asserted, *provided, however, adequate means of enforcing the right still remain.* (Citing cases.)" (Italics added.) See, also, Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 152 P.2d 625.

[2-4] Respondent argues that section 45.2 as it read in 1939 is susceptible of the construction which the 1943 Legislature sought to place upon it in section 4 of the 1943 amendment, hereinbefore set forth. This same argument was made in the recent case of California Emp. Stab. Comm. v. Chichester Transp. Co., 75 Cal.App.2d 899, 172 P.2d 100, and in rejecting said argument this court said at page 901 of 75 Cal.App.2d, at page 101 of 172 P.2d:

"The 1943 amendment further provided that the above italicized portion 'is hereby declared to be merely a clarification of the original intention of the Legislature, rather than a substantive change, and such section shall be construed for all purposes as though it had always read as hereinabove set forth.' Stats.1943, ch. 1114, § 4.

"It is appellant's position that the latter provision is controlling in the present action; that the interpretation of the Legislature in 1943, if not controlling, should be persuasive of the intent of the original enactment. Citations have been submitted but they may be epitomized as follows: 'Although the legislature cannot authoritatively fix the meaning of the constitution, and its interpretation is not controlling upon the court, yet, where the meaning is doubtful, the contemporaneous and long-continued construction thereof by the legislature is entitled to great deference, and may be supposed to reflect the views of policy and modes of reasoning which prevailed among the framers of the constitution.' 5 Cal.Jur. sec. 37, p. 604. Section 45.2 as enacted in 1939 is unambiguous and clear. It permitted suits for the collection of unemployment contributions outside the period prescribed in sec. 338, subd. 1 of the Code of Civil Procedure regardless of the intent of the taxpayer where no return had been filed. The right to construe a preexisting statute belongs to the judiciary. Courts may not be forced to construe such a statute in accordance with legislative interpretation though the Legislature has a right to define the terms of a statute for the future. It may not revise the operation of an existing law in the form of an amendatory statute to affect past transactions."

Appellant contends that it was not allowed a reasonable time to enforce the right of the State to the delinquent contributions after the finality of the assessment was established by the decision of the commission on July 1, 1943, denying respondent's petition for reassessment. The action, as hereinbefore noted, was commenced on January 25, 1944, almost seven months after the final determination of respondent's liability and almost six months after the effective date of the 1943 amendment to section 45.2.

[5] Counsel for appellant concedes that if appellant commission failed to file its action within a reasonable time after August 4, 1943, it was barred by the statute of limitations, and the question which we must here determine is whether or not the trial court's implied finding that appellant did not file its action within a reasonable time is supported by the record. Appellant argues that the great volume of its accounts and pending actions to recover delinquent contributions supports the conclusion that the filing of the action in the instant case was within a reasonable time after the change of statute. There is, however, nothing in the record to show how many of these accounts or actions there were, but even if there were the number claimed by appellant, we do not believe that an appellate tribunal would be justified in holding that the finding of the trial court is without support in the record. While it is true that the statute did not become effective until August 4, 1943, it is also true that the additional assessment here in controversy was levied upon respondent on November 17, 1942, for contributions claimed by appellant for the year 1937, and that the finality of this assessment was determined by appellant commission July 1, 1943. It is also true that the bill (Assembly Bill No. 1518) which became Chapter 1114 of Statutes of 1943 was finally passed by the Legislature on May 5, 1943, and was approved by the Governor on June 8, 1943, so that while the statute did not become effective until 90 days after May 5, 1943, the date of the final adjournment of the Legislature, the trial court could well have assumed that appellant commission was aware of the enactment of said statute on July 1, 1943, the date upon which the finality of the assessment was established. Furthermore, it is evident from an examination of the original pleadings that the complaint is a form already prepared and that with the exception of filling in the name of defendant and the dates and amounts of contributions upon which the action is predicated, the only further typing consists of an allegation of the corporate status of the defendant. Under such circumstances we do not believe that a finding by the trial court that a delay of nearly seven months after the assessment was final, and nearly six months after Chapter 1114 became effective, was an unreasonable delay in filing the action, lacks support in the record. As this court said in California Emp. Stab. Comm. v. Chichester Transp. Co., supra, 75 Cal.App.2d at page 902, 172 P.2d at page 102: "Assuming any effect can be given to the legislative intent to affect existing causes of action by its amendment of sec. 45.2 in 1943, it could not affect them until a reasonable time had passed, and the trial court's determination of what constitutes a reasonable time will not be reversed unless it can be said that its conclusion constituted an abuse of discretion."

It is fundamental that what constitutes a reasonable time depends upon the facts of the particular case and is primarily to be decided by the trial court. Wells Fargo & Co. v. City and County of San Francisco, supra; Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 62 P.2d 177; Weaver v. Grunbaum, 31 Cal.App.2d 42, 87 P.2d 406; Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 P. 934.

[6] It was the function and duty of the trial court to determine whether or not the action was filed within a reasonable time after Chapter 1114, Statutes of 1943, became effective. The trial court has determined that the action was not filed within a reasonable time after the statute became effective and an appellate tribunal should uphold that determination unless it can be said that "such conclusion constituted an abuse of discretion." As we have already pointed out, the trial court's finding has substantial support in the record and we must, therefore, hold that the trial court did not err in holding that appellant's cause of action was barred by subdivision 1 of section 338 of the Code of Civil Procedure.

Counsel for appellant in its closing brief refers to the recent case of California Emp. Stab. Comm. v. Chichester Transp. Co., supra, in which the trial court upon somewhat similar facts held that an action filed within slightly less than seven months after the statute became effective was filed within a reasonable time, which holding was affirmed by this court. An examination of the record in the Chichester case reveals that that case was tried two days after the instant case but that the judgment therein was entered more than two months prior to the entry of the judgment in the instant case. We do not believe that the affirmance of the judgment in the Chichester case compels us to hold that as a matter of law the complaint in the instant case was filed within a reasonable time. The two cases were tried separately and the appeals in both cases were pending at the same time. If the argument is sound that we must hold as a matter of law that the instant action was filed within a reasonable time because of our decision in the Chichester case, then it would also be a sound argument that, if the appeal in the instant case had been decided first, and we had held that because the question of what was a reasonable time was primarily a question for the trial court, we must affirm the holding of the trial court that the action was not filed within a reasonable time, we would have been compelled to reverse the finding of the trial court in the Chichester case that the action was filed within a reasonable time. The law not only permitted but compelled the two cases to be filed and tried separately. The law likewise made it the duty of the trial judge in each case to weigh the evidence and determine the question of whether or not the action was filed within a reasonable time. For this court to hold that because of the decision in the Chichester case we must now hold that the trial court in the instant case did not have the right to weigh the evidence and determine the question as to whether or not the action was filed within a reasonable time would in our opinion be a clear invasion by an appellate tribunal of the province of the trial court and would in effect amount to judicial legislation.

Our conclusion that the trial court correctly held that appellant's cause of action was barred by the statute of limitations makes it unnecessary to discuss the question of whether the trial court was also correct in sustaining the defense of estoppel.

In view of the foregoing the judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice.

I dissent. The majority opinion is unsound on principle, and fails to follow controlling authorities. It creates a most confusing and anomalous situation. In the case of California Emp. Stab. Comm. v. Chichester, etc., Co., 75 Cal.App.2d 899, 172 P.2d 100, cited in the majority opinion, the tax proceeding, identical with the one here involved, was filed on February 28, 1944. The Superior Court of San Francisco found that the proceeding was filed within a reasonable time after August 4, 1943, the effective date of the statute imposing the statute of limitations on the State. This court affirmed that holding. Thus, in that case, it was determined that a little less than seven months was a reasonable time for the State to file its action. In the instant case the State filed its action January 25, 1944, substantially less than six months after the effective date of the limitation statute. In this case the Superior Court of San Francisco, a different judge presiding, has held that the State's claim was barred by the statute of limitations, thus impliedly holding that the action was not filed within a reasonable time. Two of the three judges that signed the Chichester opinion now affirm this latest holding. It cannot be contended that the facts relating to the reasonable time issue were any different in the two cases. The same taxing agency is involved. The same tax is involved. The very same period of time following August 4, 1943, is involved. Both cases arose in the San Francisco district. The facts as to the number of cases pending in the state agency during this period are obviously identical. Yet in the Chichester case we find this appellate court affirming a holding that seven months is a reasonable time, while in the instant case we find a majority of the same court affirming a holding that less than six months is an unreasonable time. While the law may not be an exact science, certainly it is not so unscientific, so uncertain and so illogical that an appellate court must affirm diametrically opposed conclusions based on identical and uncontradicted facts. The appellate courts are not so impotent. To so hold is to make the appellate courts a mere rubber stamp for the trial courts. It is no answer to say, as do the majority, that what is a reasonable time is a question of fact. The mere statement of that legal proposition does not make the finding of fact of a trial court inviolate. To so hold would be to apply a sound and fundamental legal proposition to a factual and legal situation to which it was never intended to apply. It would require appellate judges to close their eyes to the realities of the situation. The interpretation of uncontradicted evidence quite frequently becomes a question of law.

There is no legal distinction between interpreting a written document susceptible of two reasonable constructions, and in interpreting uncontradicted evidence. The law is now well settled that the construction of a written document, where there is no conflicting parol evidence, is for the appellate courts, and that the appellate courts are not bound by even a reasonable construction of the trial court. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910; Mitchel v. Brown, 43 Cal.App.2d 217, 110 P.2d 456; Texas Company v. Todd, 19 Cal.App.2d 174, 64 P.2d 1180. The same rule should here apply.

It is not necessary, however, to rely on analogies. There is ample Supreme Court authority, binding on this court, holding that appellate courts will not countenance diametrically opposed conclusions from the same facts. The leading case is Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847. The problem there presented was this: An aqueduct operated by the city of Los Angeles broke. The Inyo Chemical Company and the Southern Pacific Company suffered severe damage to their properties. Each brought an action against the city. In both cases the major issue was whether the aqueduct broke as a result of the negligence of the city, or whether the break was caused by an act of God. The cases were tried before separate courts. The evidence, although somewhat conflicting, was substantially the same in the two cases. One trial court found the accident occurred as the result of the negligence of the city. The other trial court found that the accident was caused by an act of God, and that the city was not negligent. The two cases were separately appealed. The appellate court affirmed both determinations of the trial court, using much the same argument as is advanced by the majority in the instant case, namely, that the determinations involved were questions of fact. The Supreme Court granted hearings in both cases. In the first case—Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850—the Supreme Court affirmed the finding that the city was negligent. The Supreme Court then considered the Southern Pacific case, supra, in which the trial court had held that the aqueduct failed because of an act of God and that the city was not negligent. This determination was reversed, not because it was not supported, but because it was opposed to the finding in the Inyo Chemical Co. case. At page 548 of 5 Cal.2d, at page 849 of 55 P.2d, appears this most significant language which is clearly applicable here: "It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases."

This is not an isolated ruling. In Colburn Biological Institute v. Shaffer, 12 Cal. 2d 168, 169, 82 P.2d 938, the Supreme Court stated: "Moreover, a granting of the requested relief will be another step toward the termination of this litigation and will do much to obviate a contrary adjudication as to the personnel of the institute's trustees. Diametrically opposed judgments upon this legal issue would present an anomalous and wholly unsatisfactory situation." The same rule was announced, and the rule of the Southern Pacific Company case unequivocally reaffirmed, in Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, at page 780, 135 P.2d 569, at page 573. These cases are binding on an intermediate appellate court. They are not mentioned in the majority opinion.

Of course, the fact that the finding in the Chichester case that seven months was a reasonable time was affirmed, is now not binding in this case. It is not a matter of which court decided the problem first. The true rule is this: We must now determine from the facts presented in the instant case and in the Chichester case, as a matter of law, what constitutes a reasonable time. We must exercise an independent judgment on this issue. Otherwise we would not be performing our proper appellate functions. Certainly the finding of the first trial court deciding this issue is not binding in this second appeal. After reading all the evidence in both cases relating to this issue, as an appellate justice, I now determine, as a matter of law, in interpreting the identical evidence introduced in both cases on this issue, that seven months is a reasonable time. A fortiori six months is necessarily a reasonable time, and the implied finding of the trial court to the contrary in the instant case should not stand.

The judgment here involved cannot be sustained in toto on any theory of estoppel. In the instant case the estoppel is predicated upon the alleged representations of an unidentified tax auditor of the taxing agency who, it has been found, made certain representations to the taxpayer upon which he relied. So far as tax cases are concerned, it has been heretofore held that official rulings of a tax agency may, under some circumstances, create an estoppel against the tax agency. Garrison v. State of California, 64 Cal.App.2d 820, 149 P.2d 711; La Societe Francaise, etc., v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47. There is, of course, a great difference between formal rulings by the tax agency, and informal opinions given by, or conversation had with, a mere employee of the agency. There is nothing in the record of the present case to show the actual or ostensible authority of the employee to make the representations. However, even if it be conceded that the representations of a mere employee are sufficient to create the estoppel, certainly, on reason and authority, the estoppel should not apply to the total tax, but only to that portion which could have been passed on, which right has been lost in reliance on the representation. This problem was discussed by this court at length in the La Societe Francaise case, supra. It was there held that while the estoppel would apply against the portion of the tax which could be passed on to the employees, and to interest and penalties, the estoppel could not apply to the portion of the tax due from the taxpayer which he had to pay himself. A moment's reflection will demonstrate the necessity for such limitation. If it once be held that a representation by a mere employee will create an estoppel against the State in tax cases even as to that portion of the tax due from the taxpayer, the collection of taxes admittedly due would be seriously hampered by one incompetent or careless or dishonest employee. Normally, an estoppel does not apply against the State. In recent years certain exceptions to that rule have been created. See Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, and cases there cited. The La Societe Francaise case created another exception and a proper one. But the rule of that case should not be extended so as to apply against a tax admittedly due where the tax could not have been passed on had the representation not been made. Any intimation in the case of Garrison v. State of California, 64 Cal.App.2d 820, 149 P.2d 711, that the estoppel can or does apply to the total tax is unsound and should not be followed.

For these reasons I believe that the judgment should be reversed.

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77 Cal.App.2d 748

PEOPLE v. AGNEW.

Cr. 4029.

District Court of Appeal, Second District, Division 2, California.
Jan. 22, 1947.

Rehearing Denied Feb. 4, 1947.
Hearing Denied Feb. 20, 1947.

1. Perjury 🔑12

A reckless statement in a judicial proceeding which is not known to be true is "perjury" if in truth such averment is false. Pen.Code, §§ 118, 118a, 125.

See Words and Phrases, Permanent Edition, for all other definitions of "Perjury".

2. Perjury 🔑6

The making of a false statement in a pleading filed in a judicial proceeding is "perjury". Pen.Code, §§ 118, 118a, 125.

3. Perjury 🔑34(4, 5)

Under statute requiring proof of perjury by testimony of two witnesses or by testimony of one witness and corroborating circumstances, corroborative evidence may be circumstantial as well as direct, it may be discerned in testimony and behavior of accused himself, both on witness stand and elsewhere, and it need not be sufficient to establish the fact without the aid of other evidence. Pen.Code, § 1103a; Code Civ.Proc. § 1968.

4. Perjury 🔑36

Under statute requiring proof of perjury by testimony of two witnesses or by testimony of one witness and corroborating circumstances, where accused's testimony and behavior is relied upon as corroborative evidence, jury must interpret attitude, conduct and testimony of accused and, if they are convinced, to find the ultimate fact that he committed perjury as charged. Pen.Code, § 1103a; Code Civ. Proc. § 1968.

5. Perjury 🔑33(1)

Evidence supported conviction of perjury based on willfully false statements made by defendant in a verified complaint for an injunction charging that persons named therein were operating houses of prostitution. Pen.Code, §§ 118, 118a, 125.

6. Perjury 🔑12

If a person willfully swears to a belief in existence of a fact in a judicial proceeding which he knows does not exist he is as guilty of "perjury" as if he had sworn directly to existence of a fact which he knew did not exist. Pen.Code, §§ 118, 118a, 270.

7. Perjury 🔑11(8)

Any allegation in verified complaint forming basis of perjury prosecution was material if evidence that would establish the truth of it could have properly influenced court which tried or would have tried issues under the complaint, as regards whether proof of falsity of the allegation would establish perjury. Pen.Code, §§ 118, 118a, 125.

8. Perjury 🔑1

The crime of perjury is not complete until the verified false statement of the accused leaves the hands of its author. Pen.Code, § 124.

9. Criminal law 🔑112(1)

Fact that verified complaint for injunction forming basis of perjury prosecution was verified in Santa Barbara county did not defeat jurisdiction of superior court of Ventura county in perjury prosecution, where it was established that the complaint was filed with the county clerk of Ventura county. Pen.Code, § 124.

10. Perjury 🔑12

Where a defendant willfully swears in a judicial proceeding to a belief that a fact exists when at same time he knows that it does not exist, he is guilty of "perjury". Pen.Code, § 125.

11. Indictment and Information 🔑159(1)

A court may permit amendment of an indictment by either district attorney or grand jury so long as offense charged is not changed and no prejudice is done to substantial rights of accused. Pen.Code, § 1008.

12. Perjury 🔑26(3)

Defendant's knowledge of falsity of his charges in affidavit forming basis of perjury prosecution and his deliberation in making the affidavit were both implied in the word "willfully" used in indictment, and could be assumed from fact that defendant appeared before an officer and solemnly swore to the affidavit. Pen.Code, § 966.

13. Perjury 🔑19(1)

An accusation for perjury is sufficient when it sets forth substance of the controversy or matter in respect to which offense was committed and before whom oath alleged to be false was taken, and that the person before whom it was taken had authority to administer it, with proper allegations of falsity of matter on which perjury is assigned. Pen.Code, § 966.

14. Criminal law 🔑1186(4)

Proof that defendant in perjury prosecution was not furnished with a copy of transcript of grand jury proceedings and witnesses before that body in its investigations of defendant's utterances before first trial which resulted in a disagreement of jury did not establish prejudicial error, where defendant admittedly received a copy one week prior to second trial which resulted in his conviction, and he made no showing of prejudice resulting from tardiness and service upon him of the copy of the grand jury proceedings. Pen.Code, § 925; Const. art. 6, § 4½.

15. Criminal law 🔑1150

The ruling of trial court upon a motion for change of venue on ground that defendant cannot secure a fair trial in county is final unless it appears from the proof as a matter of law that a fair trial could not have been had before an impartial jury. Pen.Code, § 1035.

16. Criminal law 🔑121

Refusal of defendant's motion for a change of venue on ground that defendant could not secure a fair trial in county was not an abuse of discretion under circumstances. Pen.Code, § 1035.

17. Criminal law 🔑183

Where a jury at first trial was discharged with consent of defendant without rendering a verdict, there was no "jeopardy" and trial court properly denied the plea of former jeopardy.

> See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

18. Perjury 🔑38

A verdict in perjury prosecution which found defendant guilty of offense charged in indictment was sufficient, without declaring that offense was "knowingly" committed.

19. Criminal law 🔑703

Statements of district attorney in perjury prosecution that he would prove that defendant knew himself that persons charged by him in verified complaint of operating houses of prostitution were not in fact so engaged and that the entire matter arose out of animosity which defendant bore to such persons were justified under evidence.

20. Criminal law 🔑1171(1)

Statement of district attorney made in absence of jury could not have prejudiced defendant.

21. Criminal law ⚿720(7)

Statement of district attorney in perjury prosecution that "the man who files a complaint and charges all these things in it can not be found guilty of slander. He is guilty of perjury or nothing," was a fair deduction from the evidence.

22. Criminal law ⚿700

Refusal of district attorney to divulge name of tenant of certain premises at defendant's request was an objection addressed to trial court, whose favorable ruling thereon could not be assigned as misconduct of the prosecutor.

23. Criminal law ⚿721½(2)

Where perjury prosecution was based upon defendant allegedly making willfully false statements in verified complaint charging that persons named therein were operating houses of prostitution, district attorney was properly allowed to bring to attention of jury that no proof had been made that houses of prostitution were allowed to run in the town and that although defendant promised to try to get the evidence he could produce nothing but his own narrative of interviews in beer parlors.

24. Criminal law ⚿730(3)

District attorney's statement to witness that he realized that witness wanted to get something in for defendant did not constitute prejudicial error, where trial court promptly stated that statement was improper and directed jurors to disregard it.

25. Criminal law ⚿706

Where defendant took stand and testified in his own behalf, district attorney was not guilty of misconduct in calling witnesses to impeach defendant as a witness.

26. Criminal law ⚿706

Where perjury prosecution was based upon defendant's allegedly making willfully false statements in verified complaint charging that persons named therein were operating houses of prostitution, district attorney was not guilty of misconduct in asking witnesses whether they had heard that persons named in the complaint had been engaged in operating bawdy houses.

27. Criminal law ⚿1035(3)

An appellant cannot, for first time on appeal, successfully criticize trial court's conduct of the proceedings, but to show prejudice and thereby gain a reversal, the appellant must have made his criticism of any erroneous ruling or of any remark at time when trial judge had it in his power to prevent harmful error.

28. Criminal law ⚿913(1), 1156(1)

Defendant's motion for a new trial following his conviction on ground that he could not have a fair trial in the county by reason of widespread animosity against him was addressed to trial judge's discretion, and his decision thereon would not be disturbed on appeal in absence of showing abuse of discretion.

29. Criminal law ⚿1159(2)

Decisions on questions of fact are to be made by trial court and the reviewing court cannot interfere with them unless there is no substantial support for such decisions.

30. Criminal law ⚿778(7), 1147

If under circumstances of a reported current gossip it appeared reasonably necessary for protection of interest of either defendant or state that trial court should give an instruction that defendant was presumed to be sane, such decision was within range of trial court's discretion and would not be disturbed by reviewing court.

31. Criminal law ⚿1186(4)

Where a review of the record, including the evidence, left no doubt that there was no miscarriage of justice, proof of substantial error in the instructions, if established, would not have entitled defendant to have the case reversed. Const. art. 6, § 4½.

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Appeal from Superior Court, Ventura County; A. F. Bray, Judge.

R. W. Agnew was convicted of perjury, and he appeals.

Affirmed.

R. W. Agnew, in pro. per.

Robert Kenny, Atty. Gen., Howard S. Goldin, Deputy, M. Arthur Waite, Dist.

Atty. of Ventura County, and Hal V. Hammons, Deputy Dist. Atty., both of Ventura, for respondent.

MOORE, Presiding Justice.

On August 8, 1945, appellant made affidavit before a notary public of Santa Barbara county verifying the allegations of his complaint for an injunction against specified officials of Ventura county. The gist of his complaint was that the Justice of the Peace of Oxnard Township, the Chief of Police and City Attorney of Oxnard and three designated police officers with full knowledge of the operation of houses of prostitution in that city had failed for two years to arrest or prosecute the owners or employees of such houses and had given them protection; that Justice of the Peace Pecht and one Dingeman were operating such houses for private gain and were employing whores from other cities; that the city attorney refused to file a criminal complaint or an action to abate the operation of the houses of vice and crime, and the justice of the peace had refused to permit the abatement of such houses. On the same day he filed the complaint in the Superior Court of Ventura county. On September 26, 1945, a true bill of indictment was returned by the grand jury of Ventura county charging that appellant knew that each of his allegations was false and had been feloniously, willfully and corruptly verified by him; that he knew that neither Dingeman nor Pecht was operating any house of prostitution for profit or otherwise and that he had corruptly sworn falsely and committed perjury.

On arraignment the accused man expressly waived the statutory time limit and his right to be represented by counsel and requested that he be furnished a phonographic transcript of the proceedings before the grand jury. Successive attempts to bring the case to trial were frustrated by occurrences that do not concern this appeal except the belated demurrer which was allowed, argued and overruled on January 11, 1946. After a jury trial ending in disagreement on January 18 appellant filed his motion to quash the indictment and a motion for change of venue and, on January 28, 1946, filed his "constitutional and defensive objection to trial or plea in a new trial" and a petition to perpetuate evidence. On the latter date all of appellant's motions and his plea of former jeopardy were denied, his demurrer was overruled and after three days of trial the jury returned a verdict of guilty of perjury as charged. After denials of his motion in arrest of judgment and for a new trial, the court ordered the suspension of proceedings and probation for 13 months subject to terms and conditions. Appeal was then taken from the judgment and from the orders (1) denying his motion for a new trial, (2) overruling the demurrer, (3) denying the motion to quash the indictment, (4) denying the motion for a change of venue, (5) denying a phonographic transcript of the grand jury proceedings, (6) amending the indictment and (7) "overruling constitutional and defensive objection to trial or plea in a new trial." Inasmuch as under the appeals from the judgment and the denial of a new trial authorized by statute all alleged errors may be reviewed further notice will not be taken of the six last mentioned orders. In presenting his appeal appellant has assigned ten errors by reason of which he demands a reversal.

[1, 2] (1) It is argued that the judgment has not sufficient evidentiary support; that there was a total failure of proof that appellant's oath was corrupt or that he "unlawfully swore to his allegation," or "that such allegation was material" to the complaint for injunction; that the trial "has a strong political flavor if not outright criminal suppression of evidence." Such language betokens appellant's lack of appreciation of the problem involved in a challenge of the sufficiency of the evidence to support the verdict. Before his attack upon the characters of his defendants he was charged with knowledge of the statutes which declare it to be perjury for "every person who, having taken an oath that he will testify * * * truly before any competent * * * officer, or person * * * willfully and contrary to such oath, states as true any material matter which he knows to be false," or who in any affidavit taken before any person authorized to administer oaths swears that he will testify before any competent tribunal to any particular fact and

"in such affidavit willfully and contrary to such oath states as true any material matter which he knows to be false." Secs. 118, 118a, Penal Code. Section 125 goes further in declaring: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Reading section 125 in conjunction with the first two sections quoted, as it must be (People v. Nelson, 36 Cal.App.2d 515, 97 P.2d 1043), it is seen that a reckless statement which is not known to be true is perjury if in truth such averment is false. Also, it is perjury for one to make a false statement in a pleading filed in a judicial proceeding. People v. Godines, 17 Cal.App.2d 721, 724, 62 P.2d 787. See People v. Fink, 118 Cal.App. 631, 634, 5 P.2d 641.

[3, 4] That appellant verified and filed the complaint is an admitted fact. That it contains statements which if untrue are libelous cannot be denied. It charges that defendants Dingeman and Pecht "are operating said houses of prostitution for private gain and are employing whores there from the cities of Bakersfield and Los Angeles." Both of the named men testified. Each denied that he had with the other or alone imported whores into Oxnard from any city or that he had any connection directly or indirectly with the conduct of a bawdy house in Oxnard or elsewhere at the time alleged or at any time; that he had ever owned or received revenue from a house of prostitution in Oxnard or at any place in association with the other or with any party or alone, or that he had ever been associated with the other in any business venture. Inasmuch as the jury were privileged to believe the testimony of Pecht and Dingeman, thereby establishing the falsity of the allegation with respect to those parties, the only legal question to be considered is whether their testimony fulfills the statutory requirement of proving perjury by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances. See sec. 1103a, Penal Code; sec. 1968, Code Civil Procedure.

Appellant apparently detects what he conceives to be a vice in the State's proof in that neither Pecht nor Dingeman could testify to any fact other than concerning himself, leaving the testimony of each uncorroborated. But corroborative evidence may be circumstantial as well as direct. It may be discerned in the testimony and behavior of the accused himself, both on the witness stand and elsewhere. It need not be sufficient to establish the fact without the aid of other evidence. It is a function of the jury to interpret the attitude, conduct and testimony of the accused and, if they are convinced, to find the ultimate fact, namely that he committed perjury as charged. People v. Darcy, 59 Cal.App.2d 342, 348, 139 P.2d 118; People v. Todd, 9 Cal.App.2d 237, 241, 49 P.2d 611.

[5] Not only did a number of prominent residents of Oxnard testify that they had never heard the names of Pecht and Dingeman connected with the social vice of their city, but appellant testified that on the day he filed his complaint for the injunction his home was in Santa Maria, Santa Barbara county; that less than three months prior thereto, May 17, he was tried for drunk driving before Judge Pecht; that the parties named in his complaint were connected with the prosecution of the drunk driving charge; that at the time of filing his complaint he "felt awfully riled up"; that he felt he had been let down by Judge Pecht; that there had always been animosity between himself and Dingeman; that the purpose of his making a personal investigation into vice conditions in Oxnard was to file an injunction suit against those men and all the people involved in the drunk driving case. From such admissions it was a reasonable deduction that appellant was motivated by malice and by desire for revenge and not by a sincere belief in the truth of his charges or by an unselfish zeal to serve his neighboring county. Appellant recited certain "beer conversations" with "Mexicans," "a cab driver," and "several people" who "insinuated" that Dingeman and Pecht owned houses of prostitution, but he could actually name only a single person, to wit, one Ellenberger, with whom he conversed and who said that "Dingeman and Pecht could say yes or no to the operation of a house of prostitution." He admitted that he had assumed that the prosti-

tutes with whom he conferred had been brought to Oxnard by Pecht and Dingeman. For evident, good reasons the jury disbelieved the testimony of appellant as the fruitage of an overwrought imagination.

[6] Appellant's contention that he is immune from a prosecution for perjury because his allegations were based upon information and belief is not well founded. If a person willfully swears to a belief in the existence of a fact which he knows does not exist he is as guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist. People v. Phillips, 56 Cal.App. 291, 296, 205 P. 40; In re Howell, 114 Cal. 250, 254, 46 P. 159; Cassady v. State, 18 Okl.Cr. 568, 197 P. 171, 172. For a person to couch his libelous accusations of crime and immorality against another in the conventional phrase of "information and belief" and expect to avoid prosecution for perjury because he did not make his statements directly as facts within his own knowledge, is to indulge too readily in the assumption that the law is meaningless in defining wrongs and that the machinery for prosecuting wrongdoers is too timid to go into action against one who substitutes for a direct allegation what is just as poisonous and deadly but in language which implies that the proof will be made by others than himself. People v. Godines, 17 Cal.App.2d 721, 726, 62 P.2d 787.

[7] The contention that the accusations against Pecht and Dingeman were not material to the complaint is wholly without merit. Any allegation is material if the evidence that would establish the truth of it could have properly influenced the court which tried or would have tried the issues. People v. Pustau, 39 Cal.App.2d 407, 413, 103 P.2d 224.

[8, 9] (2) The fact that the complaint for injunction was verified in Santa Barbara county does not defeat the jurisdiction of the Superior Court of Ventura county. The indictment does show upon its face that the latter court had jurisdiction. The answer to all of appellant's contentions that the grand jury of Ventura county had no power to consider and indict for the offense and that its court had no jurisdiction to try it is found in the statute which declares that the making of an affidavit is complete only "from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true." Penal Code, sec. 124. It is not until the verified false statement of the accused leaves the hands of its author that wrong to another is committed and the crime of perjury is complete. People v. Robles, 117 Cal. 681, 684, 49 P. 1042. That appellant's complaint was filed with the county clerk of Ventura county is not disputed. His perjury was thereby consummated.

[10] The contention that an affidavit to untrue allegations based on information and belief is insufficient to subject its author to a prosecution for perjury is contrary to the plain letter of section 125 of the Penal Code. When a deponent willfully swears to a belief that a fact exists when at the same time he knows that it does not exist, he is guilty of perjury. People v. Phillips, 56 Cal.App. 291, 296, 205 P. 40. In People v. Von Tiedeman, 120 Cal. 128, 136, 52 P. 155, cited by appellant, it is held that section 125 is designed to include as perjury the verified and published statement of the accused containing matter which he knows is without basis in fact. In support of his thesis appellant cites also the criminal cases of People v. French, 134 Cal.App. 694, 700, 26 P.2d 310; People v. Chadwick, 4 Cal.App. 63, 87 P. 384; People v. Smith, 1 Cal. 9; People v. Phillips, 120 Cal.App. 644, 8 P.2d 228. None of them contains the substance of his claim. His argument that "willful" perjury cannot exist where the affidavit is "according to information and belief" is also without supporting authority. People v. Swiggy, 69 Cal.App. 574, 232 P. 174, which he cites, discusses "willfully" as used in section 270, Penal Code, which makes it a misdemeanor of a father who willfully omits to provide food and shelter for his child. In the instant action appellant was accused as follows: "did * * * feloniously, willfully, knowingly and corruptly swear falsely and commit perjury * * *"; that he "well knew" that neither Dingeman nor Pecht was operating houses of prostitution "at the time of swearing to, verifying and filing said complaint on in-

junction" which alleged that those men were operating such houses for private gain.

In his attack upon the jurisdiction of the court below appellant states many theories that range far afield and cites many authorities that are not apropos. No advantage could be gained by a discussion of any of them.

[11, 12] (3) It is argued that the indictment either in its original form or as amended is insufficient to charge the crime of perjury and that if the amendment cured the pleading it was error to allow it without resubmitting the entire matter to the grand jury. The omission of the word "willful" from the pleading did not impair its sufficiency. Had the trial proceeded without it the rights of the accused could not have been affected in the slightest. Leonard v. Superior Court, 4 Cal.2d 215, 218, 48 P.2d 687; People v. Curtis, 36 Cal.App. 2d 306, 318, 98 P.2d 228. The Leonard case settles many of the points raised herein. It points out that section 1008 of the Penal Code has so modernized the rule of refined certainty that the court may permit amendment of an indictment by either the district attorney or the grand jury so long as the offense charged is not changed and no prejudice is done to the substantial rights of the accused. The answer to appellant's contention that the Curtis case should be overruled because it conflicts with People v. Turner, 122 Cal. 679, 55 P. 685, is that since the Turner decision the legislature has so renovated section 1008 as to permit the court to order an amendment. The laws are made by that body and not by the Supreme Court which essays merely to interpret. The Curtis case is a correct interpretation of the statute as remodeled. Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L. Ed. 849 and the California decisions, to wit, People v. Bradbury, 155 Cal. 808, 103 P. 215; People v. Lee, 107 Cal. 477, 40 P. 754; People v. Ward, 110 Cal. 369, 42 P. 894; People v. Ammerman, 118 Cal. 23, 50 P. 15 and People v. Perales, 141 Cal. 581, 75 P. 170, were expressions of the courts upon statutes long since in desuetude. Appellant's knowledge of the falsity of his charges and his deliberation in making the affidavit are both implied in the word "willfully" used in the indictment, and may be assumed from the fact that appellant appeared before an officer and solemnly swore to the complaint. Leonard v. Superior Court, supra.

[13] The sufficiency of an indictment for perjury has been determined by an invariable rule since 1880. It was then enacted that an accusation for perjury is sufficient when it sets forth "the substance of the controversy or matter in respect to which the offense was committed, and * * * before whom the oath alleged to be false was taken, and that the * * * person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned * * *." Penal Code, sec. 966; People v. Curtis, supra. All of such requirements are contained in the instant indictment and proof of the utterance of the false averment was established by the admission of appellant as well as by the court records. The indictment met every statutory demand for a valid accusation of perjury.

[14] (4) Appellant declares in his brief that prior to the second trial he "was not furnished with the full and complete grand jury transcript of proceedings and witnesses before that body in its investigations of defendant's utterance." He says he moved the trial court to have such transcript furnished to him and that the court forthwith heard and denied his motion. His brief later discloses that on August 22, 1945, the grand jury conducted an investigation of vice conditions in Oxnard. At that time appellant was the only witness to appear before the inquisitorial body. No inquiry into appellant's conduct occurred prior to September 20, 1945, at which time he testified. The record shows his admission in open court that he received a transcript of the grand jury's proceedings one week prior to the trial which resulted in his conviction. If he had claimed error in that a copy was not served prior to the first trial his contention would be meaningless, since the results of that trial are not on review. But inasmuch as he received a copy one week prior to the second

trial and makes no showing of prejudice resulting from a tardiness in the service upon him of a copy of the transcript of the grand jury's proceedings, his contention is not only unsupported but if true the delay in serving the transcript would be harmless. Constitution, Art. VI, sec. 4½. Substantial compliance with Penal Code section 925 is evident from the fact of service of the transcript.

[15] (5) No prejudice is shown to have resulted from the court's denial of appellant's motion for change of venue. Appellant's eloquent dissertation upon the failure of justice to prevail in a small county like Ventura, lacking in industry, devoted in the main to agriculture, where the residents are acquainted with a larger percentage of the people than in the great counties and strong bands of friendship prevail among such residents and the witnesses who testified for the People, is an argument which he might have addressed to the trial court in support of his motion for a change of place of trial. Such a motion is addressed to the reasonable discretion of the court. Section 1035 of the Penal Code requires the trial court to transfer the action to the proper court of some convenient county "if the court be *satisfied* that the representations of the applicant are true." The emphatic implication of the section is that if the trial court is not satisfied that the representations of the applicant are true it is not obliged to grant his motion. The ruling of the trial court upon such a motion is final unless it appear from the proof as a matter of law that a fair trial could not have been had before an impartial jury. The affidavit in support of the motion does not disclose such a state of public mind as to require such conclusion. To warrant such a holding by this court the crime charged and the facts averred in support of the motion must have been of such a nature as would have aroused that state of feeling which becomes a contagion upon a mere recital of the circumstances of the crime and which makes it apparent that a fair trial would have been impossible in the county by reason of an inflamed public mind. People v. Yoakum, 53 Cal. 566, 567. Not a witness testified to an opinion that an impartial jury could not be obtained. Appellant presents himself in an "unfriendly position," an outsider from another county pitted against a powerful district attorney, the mob howling at his heels. "The psychology of the pack is to tear down the weaker and devour the wounded," says appellant. But there was no mob and neither Judge Bray who presided at the second trial nor Judge Parker who presided at the first seemed to sense any blind rage on the part of the public, for the former granted probation while the latter was of the opinion that the crime of appellant was the act of a "nut" and suggested that the matter should be disposed of by appellant's retraction of his charges.

[16] The facts that some of the jurors were friends of the district attorney or his deputies and that some knew Dingeman or Pecht did not make the proof which required the trial court to grant the motion. That appellant was satisfied with the impaneled jury is evidenced by his failure to exercise four of his peremptory challenges. The thorough inquiry into the state of mind of each prospective juror by appellant as well as by the prosecutor and the court discloses that a satisfactory jury was selected, that the denial of a change of venue was reasonable and that the court's discretion was not abused. People v. Wallace, 6 Cal.2d 759, 764, 59 P.2d 115; People v. Coen, 205 Cal. 596, 604, 271 P. 1074.

[17] (6) Appellant's contention that his plea of former jeopardy should have been granted is without support. His first trial was concluded January 18 when the jury in disagreement was discharged. The second trial proceeded on January 28 when the plea of former jeopardy was presented and denied. The facts before the court showed as a matter of law that there had been neither a conviction nor an acquittal of appellant on the pending indictment. All of the proceedings thereon had been in the same court in which the plea was filed. The court therefore properly denied the plea. People v. Hinshaw, 194 Cal. 1, 24, 227 P. 156. Where a jury has been discharged with the consent of the defend-

ant without rendering a verdict there was no jeopardy and the court properly denied the plea. People v. Baillie, 133 Cal.App. 508, 513, 24 P.2d 528; People v. Kelly, 132 Cal.App. 118, 121, 22 P.2d 526. The authorities cited by appellant (People v. Tucker, 115 Cal. 337, 47 P. 111; People v. Hamberg, 84 Cal. 468, 24 P. 298, etc.) involved facts which were unknown to the court to which the pleas had been presented and therefore required submission to the jury to hear the evidence and determine whether there had been former jeopardy.

[18] (7) The contention that the verdict is void is based upon the theory that it is an essential to the validity of a verdict convicting one of perjury that it shall declare that the offense was "knowingly" committed. There is no such requirement. The verdict convicting appellant reads: "We, the jury impaneled to try the above entitled cause, find that the defendant is *guilty* of the offense charged in the indictment." A verdict of similar phrase and diction has been held sufficient. People v. Perez, 87 Cal. 122, 123, 25 P. 262; People v. Du Fault, 1 Cal.App. 2d 105, 108, 36 P.2d 196; People v. DeVaughn, 136 Cal.App. 746, 749, 29 P.2d 914; People v. Manners, 70 Cal. 428, 11 P. 643.

(8) Appellant assigns as prejudicial misconduct of the prosecutors the following acts and utterances at various stages of the trial:

(1) "We will prove that Mr. Agnew had no information of any such activity on the part of Mr. Dingeman and Pecht. In fact, he knew himself they were not engaged in the operation of houses of prostitution." (2) "The entire matter arose out of the animosity which Mr. Agnew bore to Judge Pecht because of a conviction of drunk driving he suffered in his court; and because of some business deals he had with Mr. Dingeman." (3) "He has a record three pages long." (4) "A man who files a complaint and charges all these things in it cannot be found guilty of slander. He is guilty of perjury or nothing." (5) The refusal to divulge the name of the tenant of certain premises on east 6th Street in Oxnard. (6) "I don't think he ever went into that house at 139 East 6th Street which he bases his argument on and which is part of his defense here * * * where there is a witness that knows anything about conditions in Oxnard and who has come in and testified there are houses of prostitution let run at anytime. * * * They go out and find who owns the places and go in to those places. They went in and investigated that place. He was going to try to get the evidence. What did he get?" (7) The statement to the witness Heist as follows: "Will you answer the question. I realize you want to get something in for Mr. Agnew." (8) The calling of the witnesses Mayr and Holt to testify that defendant's reputation in the community for truth, honesty and integrity was bad. (9) Misconduct in asking witnesses, including the district attorney, whether they had ever heard that either Dingeman or Pecht was connected with a house of prostitution.

[19-26] As to assignment 1, the statement of the district attorney was actually proved at the trial, not only by Pecht and Dingeman but substantially by the admissions of appellant himself. Not only did he admit that he was "riled up" at the time he filed the injunction suit and that he felt that he had been let down by Judge Pecht, but also that there had always been animosity between Dingeman and himself and that the purpose of his investigation of vice conditions in Oxnard was for the purpose of filing the injunction suit against Pecht and Dingeman. He produced no evidence that either Pecht or Dingeman had an interest in any house of prostitution except what he reported to have been said by irresponsible and, for the greater part, unnamed habitues of a beer parlor. As to assignment 2, the district attorney was justified in his statement by the evidence already quoted. As to 3, the statement was made in the absence of the jury and could therefore have caused no prejudice. As to 4, the statement was a fair deduction from the evidence. As to 5, refusal of the district attorney to divulge the name of the tenant was an objection addressed to the court, whose favorable ruling thereon cannot be assigned as miscon-

duct of the prosecutor. As to 6, it was not prejudicial for the prosecutor (a) to bring to the attention of the jury that no proof had been made that houses of prostitution were allowed to run in Oxnard, and that (b) although appellant promised to try to get the evidence he had produced nothing but his own narrative of interviews in beer parlors with a Mexican who "insinuated" Pecht and Dingeman were operating houses of prostitution; one Lucy Hicks who testified that neither Dingeman nor Pecht owned any interest in her house; certain unnamed prostitutes who, appellant admitted, he had assumed had been brought to Oxnard by the men he had accused and who did not tell him that Pecht or Dingeman owned and operated the houses of vice; Don Ellenberger, who was never called to testify and who the jury may reasonably have inferred never had existed in the flesh. As to assignment 7, the remark addressed to the witness Heist, the court promptly stated that it was improper and directed the jurors to disregard it. As to 8, it was not misconduct to call witnesses to impeach the defendant as a witness. He invited such attack when he testified. Moreover, as each of the witnesses took the stand appellant offered to and did stipulate that the witness would testify that defendant had "a bad character for truth, honesty and integrity." As to 9, it was not misconduct to ask witnesses whether they had heard that Dingeman and Pecht had been engaged in operating bawdy houses. The only evidence of his charge produced by appellant was the gossip of comparatively unknown persons recited in the testimony of appellant, and of such of those who were called to the stand all denied knowledge of any interest of Pecht or Dingeman in houses of prostitution.

[27] All of the questions of the district attorney assigned as misconduct were propounded orderly, without repetition and without violating a prior ruling or admonition of the court, and cannot therefore be condemned. The remarks made in his opening statement were a dispassionate declaration of what he intended to prove and could not be construed as an attempt to inflame the minds of the jurors. The language used in his closing address embodied only a statement of the evidence or reasonable inferences from the facts proved. But if all the acts specified by appellant, including those above mentioned as misconduct, had been vicious, inflammatory or unfair, appellant's belated criticism of them now would avail him not, for the reason that at the time he did not assign them as error, ask that they be stricken, or request that the jury be directed to disregard them or that the district attorney be reproved for misconduct. It is elementary that an appellant cannot for the first time on appeal successfully criticize the trial court's conduct of the proceedings. To show prejudice and thereby gain a reversal the appellant must have made his criticism of any erroneous ruling or of any remark at a time when the trial judge had it in his power to prevent harmful error.

[28, 29] (9) All of the grounds urged for a reversal by reason of the court's denial of the motion for a new trial have been practically disposed of in the foregoing discussion. Appellant argues in extenso that he did not have a fair trial by reason of the "atmosphere of hostility existing throughout the entire county and the jury was composed of admitted friends of the persons accused by defendant"; that the comments of Judge Parker had created a widespread prejudice against appellant; that there is not an iota of proof that he did not have the information to warrant his charges. He contends that the court erroneously (1) rejected his offer to prove his payment of $6 to Dingeman for towing appellant's truck; (2) rejected his offer to prove that one Wilson had testified at the trial of the drunk driving charge that appellant was not drunk at the time of his arrest; (3) overruled appellant's objections to the cross-examination of appellant with reference to all the defendants named in the injunctive complaint.

The trial court was familiar with each of the matters above mentioned and with all others enumerated in appellant's brief. The offers of his rejected proof as well as the admission of the State's evidence involved only elementary principles of the admissibility of evidence upon which the rulings were correct. That appellant could have a fair trial in Ventura county and that he had not suffered prejudice by reason of a widespread animosity against him were matters addressed to the sound discretion of the trial judge. (8 Cal.Jur. 581, sec. 578), and it cannot be said that his decision on either the motion for a change of venue or for a new trial was arbitrary or unreasonable. It appears necessary to repeat that decisions on questions of fact are to be made by the trial court, and with them the reviewing court cannot interfere unless there is no substantial support for such decisions.

[30, 31] (10) Practically all of the court's instructions are in conventional form. Apparently without an appreciation of their significance appellant criticises them in globo as prejudicial to his cause. No substantial defect is suggested as to any of them but emphasis is laid upon the instruction that defendant "for the purpose of this trial is conclusively presumed to be sane." This instruction had been invited by appellant when in his motion for a change of venue he had pleaded that after the first trial Judge Parker had referred to him as a "nut" and averred in his supporting affidavit that he had heard street talk that he "is a screwball and a nut because Judge Pat. R. Parker said so and he ought to know because he heard the trial and that he couldn't have been prejudiced because he was an outside judge." If under the circumstances of a reported current gossip it appeared reasonably necessary for the protection of the interests of either the defendant or the State that the court should give an instruction that the accused is presumed to be sane, such decision was within the range of the court's discretion and will not be disturbed by the reviewing court. However, if there were substantial error in all the instructions the case could not be reversed for the reason that a review of the record including the evidence leaves no doubt that there was no miscarriage of justice. Constitution, Art. VI, sec. 4½.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

REINER v. HERMANN et al.*

Civ. 13144.

District Court of Appeal, First District,
Division 1, California.

Jan. 21, 1947.

Rehearing Granted Feb. 20, 1947.

1. Evidence ⚷448

Where language of a purported contract is doubtful, parol evidence may be admitted to explain the circumstances under which it was made. Code Civ.Proc. § 1860.

2. Evidence ⚷118, 125, 127(1), 268, 269(1), 314(1)

Ordinarily, witnesses are not competent to testify as to hearsay statements but a recognized exception is that if mental or physical condition of a person is material in determining an issue, declarations of such a state or condition are admissible. Code Civ.Proc. § 1647.

3. Evidence ⚷268

If statements are of past events and not declarations of intentions of parties at particular time or within a reasonable time of execution of contract, statements are not competent as proof of mental feeling.

4. Evidence ⚷268

Where evidence of mental state is remote to extent that it may be prejudicial, it should be excluded.

5. Appeal and error ⚷864

On appeal from summary judgment, appellate court could not determine, as a matter of law, whether hearsay evidence contained in affidavits regarding mental state was or was not admissible but that question could only be determined at trial.

6. Judgment ⚷185

In action to impress trust on real and personal property and to recover possession thereof on ground of marriage settlement contract, conflicting affidavits regarding cause of separation presented an issue of fact and precluded summary judgment.

7. Husband and wife ⚷28

Contract for marriage settlement is valid between parties although not acknowledged. Civ.Code, § 178.

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* Subsequent opinion 180 P.2d 385.

8. Husband and wife 🔑28

Contract for marriage settlement was valid and enforceable between parties although not recorded. Civ.Code, §§ 178, 180.

9. Executors and administrators 🔑443(1)
Trusts 🔑371(2)

Complaint of widow against husband's executor and testamentary beneficiary to impress trust on real and personal property and to recover possession thereof under alleged contract for marriage settlement was sufficient. Code Civ.Proc. § 437c.

10. Appeal and error 🔑173(6)

Issue of statute of frauds should not be raised for first time on appeal. Civ. Code, § 1624.

11. Limitation of actions 🔑19(3)

In action by widow against husband's executor and testamentary beneficiary to impress trust on real property and to recover possession thereof, five-year statute of limitations would be applicable. Code Civ.Proc. § 318.

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Action by Mary Reiner against Rudolph P. Hermann and another, as executor of the last will and testament of Alois Reiner, also known as Louis Reiner, deceased, and others to impress a trust on real and personal property and to recover possession thereof. Judgment for defendants and plaintiff appeals.

Reversed.

Wm. G. Condron, of Los Angeles, and Wm. H. Kiler and Wm. Penn Humphreys, both of San Francisco, for appellant.

Tobin & Tobin and Raymond J. Arata, all of San Francisco, for respondents.

WARD, Justice.

Plaintiff filed an amended complaint designated as a complaint "To Impress Trust on Real and Personal Property and to Recover Possession Thereof." Defendants filed an answer to the amended complaint and subsequently a motion for a summary judgment. The trial court rendered judgment in their favor and set forth therein that the court had found "that there is no triable issue of fact * * *, and that the above entitled action has no merit"; thereupon the court ordered the amended complaint dismissed. Code of Civil Procedure, sec. 437c.

The amended complaint and other pleadings contain the following allegations: That Mary Reiner, often referred to as Marie, Mariska or Marka, is the widow of Alois Reiner, sometimes known as Louis or Luis Reiner; that Reiner died on May 4, 1943; that his last will, dated November 12, 1941, in which he devised and bequeathed certain property to Rudolph P. Hermann, was admitted to probate; that on May 28, 1943, Milan Dulik was appointed, and qualified as executor of the last will and testament; that the property is still subject to administration, and has not yet been distributed; that Reiner was the owner in fee simple and was in the uninterrupted possession "up to the date of his death" of a certain described lot and the improvements thereon, and the personal property in a flat occupied by him on Page Street in San Francisco. Reiner married his first wife, the sister of Mary, prior to 1906; Anna died in 1937. Mary Reiner had married George Biescar and lived in Los Angeles. Biescar died in December 1937. Mary Biescar married Alois Reiner at Riverside on May 18, 1940. According to the amended complaint seven days after the marriage he made a holographic will wherein he devised and bequeathed the property in question, the flats, to appellant Mary. From May 18, 1940, the date of the marriage, until June 12, 1940, Alois Reiner and Mary lived at her home in the City of Los Angeles. On the latter date they separated and Alois returned to the San Francisco flat. Thereafter they lived apart. On November 12, 1941, Alois revoked all former wills and devised the property, which is the subject of this action, to Rudolph P. Hermann, one of the defendants herein. Prior to his marriage to plaintiff, and on September 20, 1938, Reiner wrote a letter in the Czechoslovakian language to the then Mary Biescar, who could read, write and speak that language. The letter reads in part:

"Dear Dear and Dear Marka What would I not give, if on the anniversary of your birthday, love would lend me wings to fly to you. This is but a thought, but it fills me with delight. How happy am I that I know you be mine. My dear Marie it not a dream not an illusion, that you are to me all world can offer. This conviction fills my heart with joy and urges me to send you best wishes for health and happiness and wellbeing. * * * I am just struggling to spend contently those few years I still have. * * *

"But you know what the best will be if you come here. I have the house but no housewife so you can have the house after your sister and me with it. The garden is getting dry. I have nice roses but they are already wilted. My red cat needs a cook. He is very particular and I don't cook according to his taste.

"So write me a love letter how you like me and send me a few kisses so that my monk's life would be sweetened * * * With hearty greetings and I am nicely hugging you and kissing you on both cheeks and your little mouth * * * Respectfully yours your loyal Luis."

This letter is relied upon by Mary Reiner, the plaintiff, to prove that an offer was made by Alois Reiner to give certain real property to her if she should marry him. The execution and translation of the letter are admitted by respondents for the purpose of the disposition of the motion for summary judgment. Code of Civil Procedure, sec. 437c, provides that, upon a motion, a complaint may be dismissed and judgment entered for the defendant after an answer has been filed, in the discretion of the court, if it appears that the action has no merit. Likewise, the court may use its discretion and enter judgment for plaintiff when it appears that there is no defense to the action. The section provides that the motion may be granted "In an action to recover * * * an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law or to recover possession of specific real or personal property or for specific performance of a contract in writing for the sale or purchase of property * * * if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party * * *." There is a provision designating the proper legal notice and the motion may be supported by affidavits from either side, which may show facts which may be deemed sufficient to dispose of the motion. The section further provides: "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto."

[1] The trial court had before it the pleadings, including the letter and certain affidavits. Plaintiff furnished the translation of the letter. The rule is that when the language of a purported contract is doubtful, parol evidence may be admitted to explain the circumstances under which it was made. Code of Civil Procedure, sec. 1860, confers this right of construction on the "Judge" who is "Placed in the position of those whose language he is to interpret."

Passing from the preliminary to the primary or principal question involved, this court is now confronted with the identical legal question presented to the trial court, namely, has plaintiff failed to allege sufficient facts so that, as a matter of law, her complaint fails to allege an enforceable contract between her and Alois. This is not a case wherein there is no issue of fact, and the appellate court is permitted to make a final determination in accordance with its own views on the applicable principles of law involved in the construction of a contract. Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moore v. Wood, 26 Cal. 2d 621, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685. Assuming that there are many circumstances alleged in the pleadings and affidavits which would indicate, and perhaps prove, that whatever offers were made by Alois were not accepted by Mary, or that the delay in the performance of the marriage contract negatived the offer as the basis of consideration, or that the acceptance of Alois by Mary as her husband was negatived by her neglect or refusal, whichever it may have been, to live with him in San Francisco, the home of Alois, these circumstances all present questions, not of law but of fact. These are matters of defense and should have been referred to the trier of facts.

[2-5] In addition, attention should be called to the fact that some of the affidavits contain hearsay statements, as to which ordinarily witnesses are not competent to testify. A recognized exception to the hearsay rule is that the mental or physical condition of a person is often material in determining an issue, and that declarations of such a state or condition are admissible. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civil Code, sec. 1647. If the statements are of past events, and not declarations of the intentions of the parties at the particular time or within a reasonable time of the execution of the contract, the statements are not competent as proof of mental feeling. Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239. Where the evidence is remote to the extent that it may be prejudicial, it should be excluded (Estate of Anderson, 185 Cal. 700, 198 P. 407; Shea v. Leonis, 29 Cal.App.2d 184, 84 P.2d 277) on a motion for summary judgment. This court cannot determine, as a matter of law, whether such hearsay evidence is or is not admissible. That can only be determined at the trial.

[6] The affidavits disagree respecting the cause of separation, which occurred twenty-five days after the marriage. The marriage date is alleged to be May 18, 1940. The letter upon which this action is based is dated September 20, 1938. Assuming, but not deciding, that Mary accepted in 1940 the offer of Alois made in 1938 to marry, still there is a disagreement relative to the cause of the failure of the parties to live in Alois' San Francisco home, which was one of the considerations stated by Alois in the original offer to marry. Plaintiff contends that her failure to live in the Page Street property was due to Reiner's desertion of her in Los Angeles. This presented an issue of fact. In Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62, 64, the court stated: "Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. By an unbroken line of decision in this state since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns." See, also, Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 122 P.2d 264; Hardy v. Hardy, 23 Cal.2d 244, 143 P.2d 701; Loveland v. City of Oakland, 69 Cal.App.2d 399, 159 P.2d 70; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 152 P.2d 774.

[7] It may be assumed, but only for the purpose of disposing of the present appeal, that the letter was an offer for a marriage settlement. The letter was not acknowledged. "All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved." Civil Code, sec. 178. It is necessary to treat the lack of acknowledgment of the purported contract for a marriage settlement in like manner as a grant of land. "In California the acknowledgment of a deed is not essential to its validity. The acknowledgment of a deed is merely evidentiary in character and is required only to entitle it to be recorded so as to render it competent evidence of the conveyance without further proof. Williston v. City of Yuba City, 1 Cal.App.2d 166, 171, 36 P.2d 445; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180; Dutton v. Locke-Paddon, 37 Cal.App. 693, 174 P. 674; 9 Cal.Jur. 113, sec. 18. [p.]" Osterberg v. Osterberg, 68 Cal.App.2d 254, 262, 156 P.2d 46, 50; see, also, Ogg v. Gunderson, 74 Cal.App.2d 384, 168 P.2d 793.

In support of their position defendants cite 1 Hittell, 3576, the predecessor of Civil Code sec. 178, as construed in Estate of Patton, Mr. Prob., 241. The Patton case holds that, as the purported marriage settlement was not acknowledged or proved before the marriage, it had no validity as a marriage contract. In the Patton case, the document was acknowledged some years after marriage, but the court refused to enforce it. The probate department of the City and County of San Francisco in 1879, as set forth in Myrick's Probate Reports, presented a method of procedure which has been subsequently approved by other trial judges, but the rules announced served only "until the higher tribunal has given a more authoritative decision." See Prefatory in Myrick's Probate Reports, p. IX. The rule of the Patton case is not convincing. The court is of the opinion, as already held, that the rule applicable to deeds applies to this situation, and that, as between the parties, failure to acknowledge is immaterial.

[8] The agreement lost nothing in legal force because it was unrecorded. The recording or non-recording of a marriage contract as to interest in the property of a spouse "Has a like effect as * * * a grant of real property." Civil Code, sec. 180. Estate of Cutting, 174 Cal. 104, 161 P. 1137, did not involve an omission to acknowledge a marriage settlement contract, but the effect of non-recordation. In the Cutting case, 174 Cal. at page 109, 161 P. at page 1138, it was stated: "* * * It makes no difference that there was no recordation of the instrument, even if it be labeled a 'marriage settlement.' Section 178 et seq. of the Civil Code relate merely to the rights of creditors and of others who might have interest in real property involved in any such settlement. By section 180, [of the] Civil Code, the rule is announced that the recording or failure to record such a document has like effect as the recording or nonrecording of a grant of real property. Such a grant is of full force as between the parties, regardless of the question of recordation." See Burnes v. Burnes, 203 Ark. 334, 157 S.W.2d 24.

[9, 10] Respondents contend that, despite the lack of acknowledgment, the letter is insufficient under the Statute of Frauds. This contention does not appear definitely in the pleadings. Apparently plaintiff's suit is based on a written document. Civil Code, sec. 1624. The issue of the Statute of Frauds should not be raised for the first time on appeal. The complaint may have been demurrable on some special ground, but it stated facts which gave the trial court jurisdiction.

[11] It is true the complaint alleges that the executor of the estate holds the rents collected, in trust, for the benefit of Mary, but the basis of the action is to force Rudolph P. Hermann to convey the real property to Mary. Without a conveyance from Hermann to Mary, or an order directing the executor to convey the property, or a ruling that such an order be made in the final distribution of the estate, the executor would have no authority to transfer the rentals to Mary. In brief, the purpose of the present action is to recover possession of the real property. A possessory action to recover real property may be instituted within five years. Code of Civil Procedure, sec. 318. In view of the conclusion reached, other points presented by appellant need not be considered.

The summary judgment is reversed.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.

77 Cal.App.2d 739

BLOCK v. D. W. NICHOLSON CORPORATION et al.

Civ. 13265.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1947.
Rehearing Denied Feb. 21, 1947.

1. Joint adventures 🔑7

A joint adventurer dealing with third person acting in good faith without knowledge of limitation on adventurer's authority is presumed to have been given power to bind coadventurers by contracts reasonably necessary to carry on business of joint venture. Civ.Code, § 2403.

2. Joint adventures 🔑7

A joint adventurer, not known to be such by a third person entering into contract with coadventurer individually, is not liable to third person for services performed under such contract or for damages for breach thereof by reason of fact that contract relates to business of joint venture, where coadventurer exceeds his authority to make contract and is without power to bind coadventurers thereby. Civ.Code, § 2403.

3. Insurance 🔑105

Joint adventurers who agreed to permit insurance broker to share in adventurers' insurance in exchange for broker's procurement of additional financing of joint venture did not thereby agree to pay reasonable value of broker's services in procuring additional financing.

4. Insurance 🔑106

If joint adventurers breached their agreement to permit insurance broker to share in adventurers' insurance in exchange for broker's procurement of additional financing for joint venture, by causing broker to share insurance with others, broker could treat agreement as rescinded and sue for reasonable value of his services, less amount actually received by broker as commissions on the insurance which broker did share, notwithstanding that commissions were not paid by adventurer but by insurance companies involved.

5. Account, action on 🔑17

A "book account" is a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation, and a necessary element is that the book will show against whom and in whose favor the charges are made.

See Words and Phrases, Permanent Edition, for all other definitions of "Book Account".

6. Account, action on 🔑18

The inclusion of item claimed by insurance broker as reasonable value of services rendered joint adventurers in procuring financing for joint adventure, in open account between broker and adventurer dealing with insurance procured by broker for adventurers, did not give rise to cause of action in favor of broker on account for services rendered in the amount of such item.

7. Account stated 🔑1

An "account stated" requires that there be an acknowledgment of previous indebtedness constituting consideration upon which new contract is based and agreement that balance is correct and express or implied promise for payment of such balance.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Stated".

8. Account stated 🔑3

Where joint adventurers agreed to permit insurance broker to share in adventurers' insurance in exchange for broker's procurement of additional financing for joint venture, broker's claims that previous relationship between broker and adventurers of debtor and creditor was preexisting legal obligation on adventurers' part, either to continually place insurance through broker or to pay broker reasonable value of his services in procuring additional financing, was insufficient for "account stated", since office of account stated is only to determine amount of debt where liability exists.

9. Appeal and error 🔑1178(1)

Where plaintiff alleged four causes of action and only one cause of action was supported by evidence, general finding that allegations of complaint were true and that allegations of answers, except those in admitting allegations of complaint were untrue, did not dispose of issues litigated, and hence judgment on such finding would be reversed, with directions to make finding as to issues litigated.

10. Appeal and error 🔑1213

Where judgment was reversed on ground that general finding that allegations of complaint were true and allegations of answers were untrue did not dispose of issues litigated, new findings which trial court was directed to make on issues litigated would be based on evidence already introduced or on additional evidence thereafter produced in trial court. Code Civ. Proc. § 956a; Rules on Appeal, rule 23; Const. art. 6, § 4¾.

11. Appeal and error 🔑891, 1122(1)

The constitutional provision, statute, and rule of appeal relating to findings and additional evidence on appeal ordinarily apply to a case where judgment may be cleared by additional findings. Code Civ. Proc. § 956a; Rules on Appeal, rule 23; Const. art. 6, § 4¾.

12. Appeal and error 🔑891, 1122(1)

Where findings and evidence were so inconsistent that miscarriage of justice might have resulted, reviewing court would reverse with directions to make findings on the specific issues involved and would not invoke constitutional provision and statute and rule of appeal relating to findings and additional evidence on appeal. Code Civ. Proc., § 956a; Rules on Appeal, rule 23; Const. art. 6, § 4¾.

13. Appeal and error 🔑110

An order denying motion for new trial is nonappealable.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Archie I. Block against D. W. Nicholson Corporation and John J. Moore Company and Maxwell Reid to recover $2,500 as reasonable value of services rendered by plaintiff in procuring the investment of $50,000 in a business venture of the defendants. From a judgment for the plaintiff against D. W. Nicholson Corporation and the John J. Moore Company, and, from an order denying the new trial motion of D. W. Nicholson Corporation and the John J. Moore Company, such defendants appeal.

Judgment reversed with directions, and appeal from order dismissed.

J. W. Ehrlich and Roy A. Sharff, both of San Francisco (John F. O'Sullivan, of San Francisco, of counsel), for appellant D. W. Nicholson Corporation.

McKee, Tasheira & Wahrhaftig, Ridley Stone, and J. D. Cooper, all of Oakland, for appellant John J. Moore Co.

Dinkelspiel & Dinkelspiel, Carlos J. Badger, and Harold A. Block, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment in favor of plaintiff against The John J. Moore Co., hereinafter referred to as the Moore company, and D. W. Nicholson Corporation, hereafter referred to as the Nicholson corporation, jointly and severally, in the sum of $2,500, with interest from August 4, 1943, and costs; and from the order of said court denying defendants' motion for a new trial.

Moore company and Nicholson corporation, as joint adventurers, were successful bidders for the construction of the Port of Oakland cantonment, a War Department project. They furnished the necessary "bid bond" but had difficulty procuring a "performance bond." Maxwell Reid, the president of Moore company, and apparently the manager for the joint venture, on or about March 27, 1942, requested respondent, Archie Block, real estate and insurance broker, to attempt to procure the performance bond. The influence of Roy Block, respondent's brother, who was a friend and neighbor of Reid, appears to have been an instrumental factor in Reid's selection of respondent. For successful performance, Block was told by Reid that he would be Reid's insurance broker. Within a few days thereafter, Reid asked Block to cease making contacts with bonding companies and to devote his efforts to obtaining additional financing, since the bonding companies had required this before they would issue a bond. Moore company's broker at that time was one Ray W. Jones. A year or more before the Oakland cantonment job, respondent went over the Moore company's insurance policies and showed Reid that there were certain savings that could be effected if he handled the insurance. Reid explained that Jones' family connection with Moore company made it impossible for him to cut respondent in on Moore company's insurance.

About March 30, 1942, Reid informed respondent that Nicholson's insurance broker, Moller-Fischer Company, would share in the commissions from insurance on the Oakland cantonment job. Respondent and Moller-Fischer Company wrote the insurance, jointly, from that date. Respondent testified that when he was told that he would have to share the insurance Reid said that "he [Reid] would always see that I [Block] was taken care of all right." April 7, 1942, respondent induced a former client, Mrs. Conrad Sandeen, to advance $50,000 to the appellants and to become an equal co-venturer with them. The "Articles of Joint Venture" signed by Conrad Sandeen provided that the $50,000 was for the fulfillment of the Oakland cantonment job "and for no other purpose." This investment enabled an outside broker to procure the performance bond. May 5, 1942, Reid requested that Moore company's broker share in the commissions. Plaintiff's exhibit No. 3 was then drawn: "To Whom It May Concern: This is to confirm our understanding with the Ray W. Jones Company, the Moller-Fischer Company, and Archie I. Block, jointly, that they are to act as our brokers in negotiating any future bonds and insurance in connection with *any additional work* that we may procure *from the War Department*. D. W. Nicholson Corporation, The John J. Moore Co., (Signed) Maxwell Reid, Maxwell Reid." (Italics added) There is evidence that the words "any additional work" referred to War Department construction jobs at the Oakland port and not elsewhere. According to respondent's testimony, Reid again said that "he would see that I lost nothing, lost no commissions, over it."

A post exchange building, an infirmary, and a guest house were constructed as additional construction jobs at the Oakland port. On all of these, Block, Moller-Fischer Company and Jones handled the insurance and shared in the profits therefrom. Up to August, 1943, respondent received commissions amounting to $1,155.81 plus $250 from the company which procured the performance bond, making a total of $1,405.81. By July, 1942, all insurance on the Oakland cantonment job had been written. From May, 1942, to August, 1943, respondent continually solicited Reid for the insurance on jobs at Vallejo and San Rafael in which Moore company and Nicholson corporation participitated but not Mrs. Sandeen. During this time Block did not demand any compensation for procuring Mrs. Sandeen's investment. In August, 1943, respondent told Reid that he felt he was entitled to extra compensation for procuring the Sandeen investment. Reid told him to present a bill. August 4, 1943, respondent presented a statement for $2,500 directed to Reid, Moore company and Nicholson corporation. Reid asked to have his name removed. October 1, 1943, respondent presented a statement for $2,500 directed to Moore company and Nicholson corporation. This figure represents 5% of the $50,000 advanced by Sandeen and is based on real estate brokerage schedules.

Nicholson corporation's position is that it had no obligation to meet; Sandeen was advised by respondent that as she was his client she was not to pay anything, and no agreement being reached, Reid told respondent that he would have to sue to get the $2,500.

The complaint, which was filed April, 1944, joined Moore company, Nicholson corporation and Reid as defendants. Four causes of action are alleged. The first pleads an express contract—in effect that defendants "agreed to pay to plaintiff the reasonable value of his services rendered by him" in procuring the investment of $50,000 by Sandeen and that $2,500 is the reasonable value of the services. The second cause, in the form of a common count, alleged that defendants became indebted to Block in the amount of $2,500 for services rendered at their request. The third, also in the form of a common count, alleged that defendants became indebted to Block in the sum of $2,500 upon an account for services rendered. The fourth cause, likewise in the form of a common count, alleged that defendants became indebted to Block in the sum of $2,500 upon an account stated. The bill of particulars and the amended bill of particulars indicate that plaintiff based his right to $2,500 upon having induced Sandeen to advance $50,000 to defendants on or about April 7, 1942. Defendants denied any indebtedness of $2,500.

Instead of making direct findings of fact on the issues, the trial court found in general terms that the allegations of the complaint were true and that the allegations of the answers were untrue. As a conclusion of law, Moore company and Nicholson corporation were found jointly and severally liable for $2,500 plus interest from August 4, 1943, and costs.

Appellants are correct in their contention that the trial court erred in making only the general finding that the allegations of the complaint were true and those of the answers untrue, since such findings do not dispose of the issues litigated, they fail to disclose what issues were considered by the court, and do not conform to the general rules governing the clarity and preciseness of findings. 53 Am.Jur., sec. 1134, 1137–1144, pp. 788–790, 792–798.

There is authority to support findings which state that all of the allegations of plaintiff's complaint are true, and that all of the allegations of defendants' answer are untrue. Alameda County v. Crocker, 125 Cal. 101, 57 P. 766; Carey v. Brown, 58 Cal. 180; Carr v. International Indemnity Co., 58 Cal.App. 614, 209 P. 83; Kendrick v. Gould, 51 Cal.App. 712, 197 P. 681; 24 Cal.Jur. 986. None of the cited cases involved a complaint based upon several inconsistent common counts. Respondent refers to cases in which common counts were involved, but those cases differ from the present in that specific findings were made. Reliance is placed by respondent on Wood v. Mesmer, 46 Cal.App. 257, 189 P. 134. At page 259 of 46 Cal.App., at page 134 of 189 P., the court there stated that "In an action of this kind a finding by the court that the defendant did become indebted to the plaintiff in a stated sum upon an open book account, or that the defendant became indebted to the plaintiff for work and labor performed, materials furnished, etc., at or within a stated period of time, is a finding of fact, and not a mere conclusion of law." Reference is made to the Mesmer case in Oceano Beach Resort Co. v. Clark, 106 Cal.App. 582, 586, 289 P. 950, 951: "* * * we agree with the appellant that the words in the court's findings, as follows: 'But on the contrary, plaintiff is indebted to the defendant in a large sum of money, to-wit, $5,462.28'—are only a conclusion of law, as shown by the following cases: Adams-Campbell Co. v. Jones, 71 Cal.App. 723, 236 P. 322; Lynip v. Alturas School Dist., 24 Cal.App. 426, 141 P. 835; Wood v. Mesmer, 46 Cal.App. 257, 189 P. 134, and not a finding of fact at all * * *. We may state that, if the conclusion of law had been preceded by a statement of facts, showing the indebtedness of $5,462.28, as set forth in the case of Wood v. Mesmer, supra, then it would have constituted a finding of fact."

In Baird v. Ocequeda, 8 Cal.2d 700, 67 P.2d 1055, as here, the plaintiff sought to recover on an express and implied contract. The trial court found all of the allegations of the complaint as amended to be true. On appeal it was urged that the effect of this was to permit the plaintiff to recover on inconsistent theories. The Supreme Court ruled at page 703 of 8 Cal.2d, at page 1057 of 67 P.2d: "Even if this be conceded, it is not fatal to the judgment. Examination of the record discloses that there is evidence to support a recovery on either theory. This being so, the findings on the inconsistent theory may be disregarded as surplusage." The question for determination in the instant case is whether the record discloses that there is evidence to support a recovery under each of the four counts of respondent's complaint against Moore company and also against Nicholson corporation.

[1, 2] A preliminary matter concerns respondent's belief that as the $50,000 was procured for the joint venture, if he is entitled to recovery, both joint venturers may be held. The general rule as to the liabilities of joint adventurers to third persons is that: "As to third persons who deal with a joint adventurer *in good faith* and *without knowledge of any limitation upon his authority,* the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged. * * * One who is a member of a joint adventure but who is unknown to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to such third person for services rendered under such contract, or for damages for the breach thereof, by the fact that the contract relates to the business of the joint venture if the contracting member in making such contract exceeded his authority and had no power to bind his associates thereby." (Italics added) 33 C.J., 871, 872; 48 C.J.S., Joint Adventures, § 14, pages 867, 868; Civil Code, sec. 2403; 14 Cal.Jur., sec. 3, p. 762.

[3] As to the first cause of action, there is no evidence that either Moore company or Nicholson corporation "agreed to pay to plaintiff the reasonable value of his services rendered by him" in procuring the investment of $50,000 by Sandeen. The original contract under which respondent was to procure a performance bond in exchange for getting the insurance of the joint venture was rescinded (6 Williston on Contracts, sec. 1826) and a new contract substituted therefor (20 Cal.Jur. 250; 6 Williston on Contracts, sec. 1865). Under the new contract Block was to obtain additional financing in exchange for getting a share of the insurance.

[4] The second cause of action seeks restitution for appellants' breach of contract. Rest. of the Law of Contracts, sec. 347. There is evidence to support a recovery on this cause of action. Appellants concede that if they be deemed to have breached the agreement with respondent by causing him to share the insurance with other brokers, respondent might treat the contract as rescinded and sue for the reasonable value of his services provided he deducted from the reasonable value of such services the amounts received by him under the contract. Gray v. Bekins, 186 Cal. 389; Rest. of the Law of Contracts, sec. 347. Respondent received $1,405.81 as commissions from the insurance companies involved. It is immaterial that this amount was not paid by appellants, since under the agreement the consideration for respondent's services in financing the joint venture was the opportunity to write the insurance so as to receive commissions from the companies with whom respondent placed the insurance. If $2,500 is the reasonable value of his services in securing the Sandeen investment, $1,405.81 must be deducted therefrom.

Respondent admits that he originally did not intend to make a direct monetary charge for procuring the additional financing—he expected to be reimbursed for his trouble by commissions from insurance companies.

[5, 6] The third cause of action is on an account for services rendered—an open book account. The Supreme Court in Wright v. Loaiza, 177 Cal. 605, 606-607, 171 P. 311, 312, discussed a book account as follows: "A book account is defined as a 'detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' 1 C.J. 597. A necessary element is that the book shall show against whom and in whose favor the charges are made. 1 C.J. 598." Respondent claims that testimony that whenever insurance was to be placed Reid would notify Block of the necessity and Block would procure it and then bill the joint venture, sending invoices addressed to Nicholson corporation et al., is evidence of an account. It is urged that the item of $2,500 is the final entry in Block's books covering the dealings between himself and the corporations. The language of Lee v. De Forest, 22 Cal.App.2d 351, 360-361, 71 P.2d 285, 290, is in point: "It may be that there are circumstances under which an item not ordinarily included in an open

account may be placed there in the ordinary course of business, but we think this case is not one of that nature."

[7, 8] An account stated was pleaded as the fourth cause of action. "An account stated requires that there be an acknowledgment of a previous indebtedness, since such indebtedness constitutes the consideration upon which the new contract is based. It is also required that there be an agreement that the balance is correct, and a promise for the payment of such balance. This promise may be either express or implied." 1 Cal.Jur. p. 190, sec. 47. Respondent claims that the previous relationship of debtor and creditor was a pre-existing legal obligation on appellants' part either to continually place insurance through respondent or to pay respondent the reasonable value of his services in procuring the additional financing. The latter alternative would be afforded respondent as restitution were appellants to breach their contract. Rest. of the Law of Contracts, sec. 437. This is insufficient for an account stated, since the office of account stated is only to determine the amount of a debt where liability exists. Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal.App. 559, 97 P. 322, citing Chase v. Chase, 191 Mass. 556, 78 N.E. 115. As to the requirement of a promise, respondent urges that appellants' silence after receipt of the statement is sufficient acquiescence. Insofar as Nicholson corporation is concerned, there appears to have been no "silence." Furthermore, Moore company claims that the statement was to be used as a basis for discussion as to whether respondent would be paid extra compensation, and hence it is inconsistent for respondent to now assert that the time during which the matter of extra compensation was discussed gave rise to an implied acquiescence on which an "account stated" could be based. Craig v. Lee, 36 Cal.App. 335, 171 P. 1089.

[9] Unlike the situation presented in Baird v. Ocequeda, supra, there is no evidence to support a recovery under every count. Only the second count is supported by the evidence. It is impossible to tell what the theory of the trial court may have been. The general finding that the allegations of the complaint "are true" and that the allegations of the answers except those admitting allegations of the complaint "are untrue" amounts to a finding on inconsistent theories, only one of which is supported. For this reason the judgment must be reversed.

[10-12] The trial court is directed to make findings as to the following issues: Reid's authority to bind the joint venture and Block's knowledge thereof; the existence and terms of an express contract; whether the parties had performed in full or in part; whether the sum of $2,500 was the reasonable value of Block's services, and after determining such reasonable value, the amount received by respondent in commissions, namely, $1,405.81, must be deducted therefrom; whether there was an open book account; whether there was any antecedent monetary indebtedness upon which an "account stated" could be predicated, and whether appellants' conduct amounted to an implied acquiescence to the correctness of the account. Such new findings may be based on the evidence already introduced or on additional evidence produced hereafter, in the discretion of the trial court. Panama Mail S. S. Co. v. Vargas, 281 U.S. 670, 50 S.Ct. 448, 74 L.Ed. 1105; Lane v. Safeway Stores, Inc., 33 Cal.App.2d 169, 91 P.2d 160; People v. One 1940 Chrysler Engine No. C-28-10132, 77 Cal.App.2d 306, 175 P.2d 585. Section 4¾ of Art. 6 of the State Constitution implemented by Code of Civil Procedure, sec. 956a, and Rules on Appeal, Rule 23, ordinarily applies to a case where the judgment may be cleared by additional findings. In the present case the findings and the evidence are so inconsistent that a miscarriage of justice may have resulted.

[13] The appeal from the order denying appellants' motion for a new trial, being a non-appealable order (Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698), is dismissed. The judgment is reversed with directions to proceed to make findings on the specific issues involved.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

BOWMAN v. McPHEETERS et al.

Civ. 7270.

District Court of Appeal, **Third District,** California.

Jan. 27, 1947.
Rehearing Denied Feb. 25, 1947.
Hearing Denied March 27, 1947.

1. Limitation of actions 🔑179(2)

Complaint alleging that in August, 1941, patient engaged physician to remove steel sliver from his arm and treat wound, that physician used X-ray in treatment and burned the arm, causing a cancerous growth, but that physician fraudulently concealed the true condition of the arm from patient, and that in November, 1943, patient again consulted physician who again fraudulently concealed the condition of the arm, but that following month patient secured treatment from other doctors who informed him of true condition of arm established estoppel of physician, as against demurrer, to allege that malpractice action was barred by one year statute of limitation. Code Civ.Proc. § 340, subd. 3.

2. Limitation of actions 🔑104(2)

The rules to be applied in a case involving fraudulent concealment of a cause of action, in determining when plaintiff discovered or should have discovered facts giving rise to cause of action, for purpose of determining when limitations began running, are the same as those which govern in cases falling within three year statute of limitation where fraud is the gravamen of the right of action and before a plaintiff may be charged with want of diligence in failing sooner to discover the truth, he must have been under a duty to make the discovery. Code Civ.Proc. § 338, subd. 4.

3. Limitation of actions 🔑104(1)

The basis of the doctrine which prevents a defendant from setting up the bar of a statute of limitation when he is guilty of fraudulent concealment from plaintiff of the cause of action, is estoppel in pais.

4. Limitation of actions 🔑104(2)

Physician had duty to make a full and fair disclosure to patient whose arm had allegedly been burned by physician with X-ray, causing cancerous growth, of all facts that materially affected patient's rights and interests, and if physician failed to do so, then he could not set up limitations as a bar to a malpractice action during time when patient was unaware of the true condition of his arm.

5. Limitation of actions 🔑104(1)

The test for determining whether a patient, from whom a physician has concealed information concerning actual condition of patient, is put on inquiry in order to determine his true condition and institute malpractice action in order to prevent it being barred by limitations, must not be based on an inference that might conceivably be drawn but rather on a conclusion which a reasonable person would be required to reach.

6. Fraud 🔑20

Courts are loath to seize on small circumstances in order to permit one who has been guilty of fraud to escape liability on ground that plaintiff was unduly trusting or credulous.

7. Limitation of actions 🔑104(2)

Conduct of physician in concealing from patient alleged fact that X-ray treatment had allegedly burned patient's arm and caused cancerous growth, was not required to be shown to have been directed specifically against patient's bringing of malpractice action in order to toll running of one year statute of limitations. Code Civ.Proc. § 340, subd. 3.

Appeal from Superior Court, Stanislaus County; G. G. Hjelm, Judge.

Action by Herman S. Bowman against Earl McPheeters, doing business as McPheeters Hospital, and others, to recover damages for alleged malpractice. From a judgment entered on an order sustaining, without leave to amend, the demurrer to plaintiff's fifth amended complaint, the plaintiff appeals.

Judgment reversed.

Emmett R. Burns, of San Francisco, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

PEEK, Justice.

Plaintiff has appealed from a judgment entered on an order sustaining, without leave to amend, the demurrer to his fifth amended complaint which seeks a recovery for damages for malpractice.

By its order sustaining the demurrer, the trial court concluded that the cause or causes of action were barred by section 340, subdivision 3, of the Code of Civil Procedure, providing a one year period of limitation for the commencement of an action for injury by the wrongful act or neglect of another. Likewise, the only ground of attack on the sufficiency of the complaint urged on appeal by the appearing defendant is the bar of said statute of limitation.

An examination of the complaint, which is not a model of pleading, reveals the following facts:

On August 6, 1941, plaintiff engaged the services of defendant Earl McPheeters, a licensed physician and surgeon to remove a steel sliver from his arm and treat the resulting wound. In the course thereof, X-ray equipment was used, which was operated by defendants in such a careless and negligent manner that burned and injured plaintiff's arm and thereby caused a cancerous growth to form in the tissues thereof. About two weeks thereafter, due to the sore and inflamed condition of his arm, plaintiff consulted defendant McPheeters and inquired as to its cause. Said defendant stated that there had been too much heat applied to the arm, and that there was nothing wrong with it, and told the plaintiff not to worry. However, at the time of making such statements, defendant McPheeters "well knowing the cancerous condition of plaintiff's arm * * * fraudulently refused, and with the intent to deceive the said plaintiff, did not advise nor reveal to the plaintiff the true condition of his said arm." For a period of approximately one month said defendant continued to treat plaintiff's arm, still failing to disclose its true condition.

Thereafter, in the month of November, 1943, plaintiff's arm being sore and inflamed, he again consulted defendant McPheeters, who examined the arm, and, falsely, fraudulently and with intent to deceive, stated to plaintiff that he had steel poisoning in said arm from the steel sliver, but that his arm would be all right and that he was not to worry about it. Approximately three weeks thereafter plaintiff again consulted said defendant, who again examined the arm and again, falsely, fraudulently and with intent to deceive, stated that there was nothing wrong with plaintiff's arm.

In the following month plaintiff sought and secured medical attention and treatment from other physicians and surgeons who informed him that the failure of said arm to heal was caused by the cancerous growth that had formed in the tissues and not by the steel sliver. This was the first time plaintiff learned the true condition of his arm, having had faith in the ability of said defendant and having relied on said false and fraudulent statements, whereby he was induced to refrain from seeking treatment from other physicians or surgeons. It is alleged further that by reason of the said negligence of defendants, plaintiff was required to undergo an expensive operation and, as he is advised, will be obliged to be hospitalized for other and further operations in the future.

In support of his position that the action is not barred by limitation, plaintiff advances two contentions: that his cause of action did not accrue until November, 1943, the time when his treatments by defendants ceased, under the doctrine of Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, and cognate cases; and that even if his cause of action accrued in August, 1941, when the X-ray burns were inflicted or at some time prior to November, 1943, the complaint shows that the facts upon which the cause of action is based were fraudulently concealed from him by the defendants.

[1] We are of the opinion that the latter contention is well founded. "Technical rules as to when a cause of action accrues

apply * * * only in those cases which are free from fraud committed by the defendant." Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 232, 153 P.2d 325, 328. "Where a defendant is guilty of fraudulent concealment of the cause of action, the statute of limitation is deemed not to become operative until the aggrieved party discovers the existence of the cause of action." Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 168 P.2d 946, 961.

[2] It is the law in this state that the rules to be applied in a case involving fraudulent concealment of a cause of action, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action, are the same as those which govern in cases falling within subdivision 4 of section 338 of the Code of Civil Procedure where fraud is the gravamen of the right of action. Sears v. Rule, 27 Cal.2d 131, 147, 163 P.2d 443.

Under those rules it is well established that, before a plaintiff may be held chargeable with want of diligence in failing sooner to discover the truth, he must have been under a duty to make the discovery.

"To impute notice, however, the circumstances must be such that inquiry becomes a duty and failure to make it a negligent omission of duty. The converse of the proposition is equally true. Where no duty is imposed by law to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open and not availed of does not operate to give constructive notice of the facts." 20 Cal.Jur., p. 237, sec. 4.

Many situations may arise where under the circumstances there was no duty on the part of the plaintiff to institute or pursue inquiry. A considerable number of them have been reviewed by this court in the carefully considered opinion in West v. Great Western Power Co., 36 Cal.App.2d 403, 405-414, 97 P.2d 1014.

Additionally a comprehensive and instructive discussion of the law on the subject of fraudulent concealment as tolling the operation of a statute of limitation is contained in the Pashley case, supra. While that was not a case of malpractice but involved rather the concealment by physicians employed by defendant company of the existence of a cause of action against their employer, the applicable principles are essentially the same, and cases of malpractice are reviewed at some length therein.

[3] As pointed out in that decision, the basis of the doctrine which prevents a defendant in such a case from setting up the bar of the statute of limitation is estoppel in pais.

"In reality the ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong." Pashley v. Pacific Elec. Ry. Co., supra, 25 Cal.2d at page 231, 153 P.2d at page 328.

It appears that all of the elements of estoppel by fraudulent concealment are sufficiently alleged in the complaint herein. There is a showing of knowledge on the part of the principal defendant, ignorance on the part of the plaintiff, misrepresentation and nondisclosure of material facts, intent to deceive, and reliance on said representation and nondisclosure. Likewise, it sufficiently appears that plaintiff was not negligent in failing to discover the true facts sooner, and that he was not unreasonable in placing reliance on the words and conduct of the defendants.

On the question of the diligence of plaintiff, the case of Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072, discussed in the Pashley opinion, 25 Cal.2d at page 234, 153 P.2d at page 329, is of special interest because of the similarity of the facts therein to those in the present case.

That also was a malpractice case in which the trial judge sustained a demurrer invoking the one-year statute of limitation. The substance of the plaintiff's declaration is thus stated by the Tennessee Supreme Court, 45 S.W.2d at page 1072: "Hudson alleges employment of defendants and their negligent use of the X-ray, first in May, 1928, again in August 1928, and at other later dates, and that following the August treatment he discovered redness and inflammation of the skin, apparent injury; that he called defendants' attention thereto, and that they, knowing otherwise, in the exercise of professional skill which plaintiff did not possess, falsely and fraudulently represented to him that no ill effects or injurious results would follow the apparent burn, and thus concealed from him the truth that he had been injured by their negligence, as he proved to be seriously and permanently, until after the running of the statutory period."

That court, in reversing the judgment and holding that the declaration sufficiently showed that the action was not barred by limitation, said, 45 S.W.2d at page 1073: "He (the plaintiff) admits that he discovered that his skin was 'burned and blistered.' This would seem to have put him on notice. But his claim is that upon discovering this condition, the injurious effect or consequences of which he as a lay patient did not know and could not be charged with knowledge of, he promptly inquired of his physicians touching it, and was assured by them, despite their knowledge as professional men to the contrary, that this condition was in effect a mere incident of the treatment without serious or permanent injurious effects, and that he was thus lulled into ignorant security, and so kept until after the running of the statute."

[4] Perhaps the most significant feature in the present case which makes inapplicable the doctrine of constructive notice is the existence of the relationship between the parties of physician and patient, which in contemplation of law is a fiduciary one. 20 Cal.Jur. p. 1072, sec. 20. As fiduciaries it was the duty of defendants to make a full and fair disclosure to plaintiff of all facts which materially affected his rights and interests. This principle has been applied and expressed in one form or another in several recent decisions dealing specifically with the question of fraudulent concealment of a cause of action in its relation to the statute of limitation. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946; Sears v. Rule, 27 Cal.2d 131, 148, 163 P.2d 443; Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 411, 154 P.2d 399; Pashley v. Pac. Elec. Ry. Co., supra, 25 Cal.2d at page 235, 153 P.2d 325.

In the recent case of Hobart v. Hobart Estate Co., 26 Cal.2d 412, 439, 440, 159 P.2d 958, 973, that court stated: "Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. In Rutherford v. Rideout Bank, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383, it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved. See, also, Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423; Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219; Laraway v. First Nat. Bk. of La Verne, 39 Cal.App.2d 718, 104 P.2d 95; 12 Cal.Jur. 799; (1942) 30 Cal.L.Rev. 589, 591; cf. Marston v. Simpson, 54 Cal. 189; Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 575–577, 126 P. 351, 42 L.R.A.,N.S., 125."

Therefore, defendants having failed to discharge their duty of making full and fair disclosure in addition to having made false and misleading representations which at most amounted to a partial disclosure, they will not be heard to say that plaintiff was negligent in relying on the assumption that, had there been anything further to disclose in connection with the nature or extent of the injury, they would have disclosed it. Pashley v. Pacific Elec. Ry. Co., supra, 25 Cal.2d at page 235, 153 P.2d at page 330. As stated in the case last cited, "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action."

No fact as to plaintiff's condition is alleged which could be deemed to have put him on earlier notice. Plaintiff's cause of action is based on the concealment of the cancerous condition in the tissues of his arm. Defendants' partial disclosure that there was too much heat applied to his arm but that there was nothing wrong with it is not such a fact. Obviously, the assurance that there was nothing wrong with it could not apply to the temporary redness and soreness which were apparent, but naturally would be understood as referring to a permanent and serious injury. In this connection it is interesting to note that in the recent case of Dodds v. Stellar, 77 Cal.App.2d 411, 175 P.2d 607, it appears that the X-ray burn which the plaintiff received on his injured finger was patently harmful, and that, although after some treatments he allowed a period of seven months to elapse before he reported its serious condition and more than one year before he brought the action, the question of limitations was not discussed and apparently was not raised at all.

[5] The test for determining whether in a situation of this kind the plaintiff is put upon inquiry must not be based on an inference that might conceivably be drawn but rather on a conclusion which a reasonable person would be required to reach. As the supreme court stated in a recent decision: "The plaintiffs allege facts, which, if true, indicate that their discovery of the fraud of the defendants was not made until within three years of the commencement of the action. The facts alleged *do not require a conclusion* that the plaintiffs were placed on notice at an earlier date." Italics added. Neet v. Holmes, 25 Cal.2d 447, 467, 154 P.2d 854, 864.

We must not lose sight of the fact that in this controversy it is only the legal sufficiency of the showing made by the pleader that we are called upon to determine. In an analogous situation, the supreme court of Michigan, in reviewing the propriety of the trial court's ruling directing a verdict for defendant on the ground that the action was barred by limitation and there was no evidence of a fraudulent concealment, stated:

"It is contended that the record shows no reasonable diligence on the part of plaintiff to discover or detect the fraud, and that there is no evidence tending to show positive fraud on the part of defendant. In the consideration of the proposition under discussion it must be kept constantly in mind that the question of the liability of defendant to plaintiff for damages for malpractice is not before us. We are considering the question whether she can get into court to try the case involved in that issue. * * *

"Under the circumstances of this case the question of her diligence to discover her condition was one of fact, to be submitted to the jury. Smith on Frauds, § 87." Groendal v. Westrate, 171 Mich. 92, 137 N.W. 87, 88, Ann.Cas.1914B, 906, cited in Pashley v. Pacific Elec. Ry. Co., supra, 25 Cal.2d at page 233, 153 P.2d 325.

In Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440, 159 P.2d 958, 974, our Supreme Court has expressed the rule as follows: "Defendants contend, however, that certain facts indisputably known to plaintiff were sufficient to put him on inquiry. These contentions must be examined in the light of the rule announced in Northwestern Portland Cement Co. v. Atlantic P. C. Co., 174 Cal. 308, 312, 163 P. 47, 49. The court there said that when the facts are susceptible to opposing inferences, whether 'a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular facts," and whether "by prosecuting such inquiry, he might have learned such fact" (Civ.Code, § 19), are themselves questions of fact to be determined by the jury or the trial court.' See, also West v. Great Western Power Co., 36 Cal.App.2d 403, 411, 97 P.2d 1014; 20 Cal. Jur. 240."

[6] Moreover, courts are ever loath to seize upon small circumstances in order to permit one who has been guilty of fraud to escape liability on the ground that the plaintiff was unduly trusting or credulous. Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243; Twining v. Thompson, 68 Cal

App.2d 104, 113, 156 P.2d 29; Laraway v. First Nat. Bk. of La Verne, 39 Cal.App. 2d 718, 728, 104 P.2d 95.

While it properly might be said that in the present case there was not so much a concealment of the cause of action as a concealment of the material facts concerning the extent of the injuries which serve as a basis for the measurement of plaintiff's recovery, nevertheless the case still would appear to come squarely within the holding of the Pashley decision. Undoubtedly here, as in the Pashley case, had plaintiff consulted any reliable physician he would have been promptly informed of the nature and extent of the cancerous condition. Likewise, here as in that case, there is not in a strict sense the concealment of a cause of action. Rather it is the concealment of material facts concerning the extent of the injury which serve as the basis for plaintiff's recovery. However, the Supreme Court therein did not recognize the materiality of such distinction. See 33 Cal.Law Rep. p. 152.

Likewise, in the case of Hansen v. Bear Film Company, Inc., supra, it appears that the defendants properly were found guilty of fraudulent concealment, where there was sufficient evidence from which it could be inferred that they had concealed the real or true situation, the earlier knowledge of which would have disclosed to the plaintiff the nature and extent of his right of action. 28 Cal.2d 154, 168 P.2d 946.

[7] By a parity of reasoning, it would seem to be clear that the conduct of the defendants need not be shown to be directed specifically against the bringing of an action, but that if it was aimed against the acquisition of the requisite knowledge which would naturally lead to such a result, it comes within the condemnation of the rule. In this connection, the following language from the opinion in the Pashley case (25 Cal.2d at page 235, 153 P.2d at page 330) is appropriate: "Its (defendant's) false representation designed to conceal facts known to it and intended *to prevent plaintiff's consulting other physicians and thus hinder him from bringing action* until after the running of the statutory period of limitations, must be deemed to amount to fraud upon the plaintiff and to excuse any greater diligence on his part under the facts disclosed by the complaint." (Italics added.)

In other words, by conduct which has the effect of preventing the injured party from consulting other physicians and thereby becoming aware of the true facts, the defendants have for all practical purposes hindered him from bringing an action until the period of limitation has expired.

We therefore conclude that on the facts alleged the action was timely brought after discovery of the alleged fraud and that the trial court erred in sustaining the demurrer to the complaint.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 850

RICCOMINI v. RICCOMINI et al.

Civ. 3521.

District Court of Appeal, Fourth District, California.

Jan. 30, 1947.

1. Appeal and error 🔑1008(3)

Where property settlement agreement was susceptible of interpretation placed thereon by trial court and such interpretation was not unreasonable, reviewing court was bound.

2. Quieting title 🔑14

The rule that unwillingness to pay just indebtedness does not commend him who seeks aid of equity to avoid payment of such indebtedness on ground that debt, though morally due, is barred by limitations, was not applicable to husband seeking to quiet title to property which was subject to deed of trust to secure husband's obligation under property settlement agreement to make monthly payments to divorced wife, where husband's obligation to make payments to wife terminated when wife returned children to husband.

3. Mortgages ⚷299
Quieting title ⚷7(2)

A husband who executed deed of trust to secure husband's obligation under property settlement agreement to make monthly payments to divorced wife was entitled to reconveyance of property which was subject of deed of trust and to have his title thereto quieted unconditionally, notwithstanding that husband had not made all the monthly payments provided for in agreement, where husband's obligations to make payments terminated when wife returned children to husband.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action to quiet title by Paul Riccomini against Rose Riccomini and another. From the judgment, the defendants appeal.

Affirmed.

Claflin & Chain, of Bakersfield, for appellants.

Kendall, Howell & Deadrich, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought an action for divorce against defendant, his wife, on the grounds of extreme cruelty and adultery. A property settlement agreement was entered into and plaintiff secured an interlocutory decree of divorce on the grounds of extreme cruelty on April 13, 1925. The agreement was made a part of the decree and was approved by the court and defendant was awarded the custody of the three minor children, then aged 12, 10 and 8 years respectively.

The property settlement agreement provided for a cash payment by plaintiff to defendant of $2,000 and provided for a payment of $6,000 in monthly installments of $60 at 4 per cent interest. It also provided that defendant was to take care of and have the custody of the minor children "and that the payments, herein provided to be paid, are made for the purpose of the support and maintenance of said minor children"; that the defendant execute a deed to plaintiff for all her interest, as wife, in the community real property; that plaintiff execute a note and trust deed for $6,000, payable as set forth, "to secure the * * * defendant in the performance of this obligation"; that defendant "accepts the sum of $8,000 * * * to be paid for the support and maintenance of said minor children, in full settlement" of all her claims as a wife.

The deeds were duly executed. Plaintiff made all payments under the trust deed when due up to January 12, 1928. A final decree of divorce was obtained in 1927. The oldest child was stricken and became permanently disabled. The defendant, on October 25, 1927, moved the trial court, in the divorce action, to modify the decree and allow her increased maintenance for the children from the sum of $60 per month to $150 per month. The motion was heard and granted in part. By minute order plaintiff was ordered to pay the probation officer $90 per month, which sum was to be given to defendant for support of the children. No modification of the decree was made. No further action was taken. Plaintiff made the payments under the original agreement and defendant kept the children with her until January 12, 1928, at which time defendant took the three children and left them with plaintiff, at his home, and he kept them thereafter and supported them until the two daughters were married. The crippled girl is still with him. He made no payments to defendant after January 12, 1928. He had paid to her on account of the trust deed, the sum of $2606.26, leaving an apparent balance due of $3,393.74 on the principal of said note and trust deed at the time of the trial of this action.

Defendant at no time thereafter demanded any further payments on the trust deed and did not seek return of the children. Plaintiff never had the legal custody of the children changed or modified in the decree. The note and trust deed became barred by the Statute of Limitations. Defendant remarried. In June, 1944, 16 years later, plaintiff desired to clear his title to the property, and wrote defendant for a reconveyance, which she refused to sign. On

September 29, 1944, this action to quiet title against the Bank of America National Trust & Savings Association, trustee under the trust deed, and Rose Riccomini, his wife (herein referred to as defendant) was instituted.

Defendant answered and set up the note and trust deed as a defense and asked for equitable relief. After the introduction of the several documents into evidence both parties testified at the trial as to the circumstances surrounding the execution of the trust deed, note and property settlement agreement.

The husband testified that it was his intention to pay his wife $8,000 in full settlement for her interest in the property and in consideration for her supporting the minor children; that $2,000 was paid in cash and a $6,000 trust deed and note, payable $60 per month, was executed with the understanding that she had to support the children out of the payments.

The wife testified that her interest in the community property was to be $8,000 and she was to support the children.

On April 25, 1945, the trial court found that plaintiff was entitled to have his title quieted and cleared of any lien of the deed of trust; that the defendant was the beneficiary under the trust deed and note; that plaintiff had complied with all of the terms and conditions of the agreement upon which the trust deed and note were issued; that the principal sum and interest on the note has been paid and that plaintiff is entitled to have the note canceled and the lien of the trust deed removed from the property.

No provision was made in the decree for the payment of the balance claimed due to defendant from plaintiff on the note and trust deed.

Defendant appealed and now argues that there is no evidence, or at least not sufficient evidence, to support the finding, and that the finding is based upon an erroneous construction of the property settlement agreement in that the court construed it to mean that the $8,000 that plaintiff agreed to pay defendant was simply an agreement to pay said sum "for the support of the children as long as they were in defendant's possession" and that while in her possession she had to support them out of the payments made upon the trust deed. It is her claim that in fact and in law the $8,000 was to be a payment to defendant for her one-half interest in the community property.

[1] The agreement is susceptible of the interpretation placed upon it by the trial court, and that interpretation is not unreasonable. Under such circumstances, we are bound by such interpretation. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945.

Defendant next argues that even though the Statute of Limitations had run against the note and trust deed, it did not extinguish the debt, but merely provided a defense against its enforcement and therefore plaintiff was obligated under the rules of establishing equitable title to real estate as a condition precedent to relief, to do equity and pay her the balance she claims was due under the trust deed. Citing such cases as Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 336, 58 P.2d 194.

[2] There is no argument as to the general rule. What is equitable under a given set of circumstances is not always a question of law but may be a question of fact for the determination of the trial judge. It was the intention of the plaintiff, as construed by the trial court, to make the payments on the trust deed to defendant for the sole benefit of the minor children for their support and maintenance. When the defendant was relieved of this obligation and the obligation was transferred to plaintiff by the act of the defendant, the plaintiff was justified in terminating the payments thereon, as his equitable obligation to further pay her $60 per month for their support also terminated. It was intended that his obligation to pay the trust deed could be terminated under other conditions as well. The agreement provides that if the custody of the children be given to any other person than defendant, in the contemplated divorce action, then the "payments under the contract shall immediately cease * * *", or if the custody of the minor children shall, by the court, be taken from her, at the instigation of parties, other than plaintiff herein, then the payments under the contract shall cease.

It does not affirmatively appear that plaintiff's conduct shows an unwillingness to pay a just indebtedness concededly due on the ground that the debt, so morally due, is barred by the provisions of the Statute of Limitations, as indicated in Bradley Co. v. Ridgeway, supra.

[3] The plaintiff, having substantially complied with all of the requirements for payments, as set forth in the agreement, is entitled to a reconveyance and to have his title quieted unconditionally. Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Wagner v. Shoemaker, 29 Cal.App.2d 654, 85 P.2d 229.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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77 Cal.App.2d 814

BROWN et ux. v. LOS ANGELES COUNTY.

Civ. 15630.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1947.

Rehearing Denied Feb. 13, 1947.

1. Quieting title 🔑14

In an action to quiet title, a mortgagor or grantee of the mortgagor must pay the debt secured, even though it is barred by limitations, on the principle that one who seeks the aid of equity must do equity.

2. Mortgages 🔑116

Mortgage securing note given by indigent persons to county for groceries and other necessaries, and for future advances, was a lien for advances made after date of note.

3. Quieting title 🔑49

In action to quiet title to realty against which county held a mortgage given by original owners of realty to county for groceries and other necessaries furnished by county, judgment quieting title in plaintiffs subject to county's mortgage was equitable and proper.

4. Quieting title 🔑14

Plaintiffs were not entitled to have their title to realty quieted without payment of mortgage note executed by original owners of realty to county for general indigent aid, hospitalization, and medical relief furnished by the county, because of the fact that county did not record notice of advances in office of county recorder. St.1935, p. 1769, § 4.

5. Vendor and purchaser 🔑231(17)

Where a mortgage is of record, subsequent purchasers of the realty are on notice of it, and its terms and conditions.

6. Evidence 🔑376(1)

Account of original owners of realty with county with respect to indigent aid was properly admitted because sufficient foundation was laid, where witness for county testified that record was made and kept in collection file in regular course of business, that practice was to make entries at or about time of event involved, and that account showed an itemized statement of aid furnished to the original owners of the realty. Code Civ.Proc. § 1953f.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action to quiet title by Clarence W. Brown and Franchon L. Brown, husband and wife, against the County of Los Angeles. From a judgment quieting title in plaintiffs, subject to mortgage in favor of the defendant for $816.27, the plaintiffs appeal.

Judgment affirmed.

John J. McMahon, of Los Angeles, for appellants.

Harold W. Kennedy, Co. Counsel, and Earl O. Lippold, Deputy Co. Counsel, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Two elderly persons, husband and wife, were owners of a dwelling house in Los Angeles. Being in indigent circumstances, they received from the County of Los

Angeles aid, consisting of groceries and other necessaries of life, hospitalization and care for the wife after her husband died. The wife made payments upon the increasing balances due to the County, including $38 a month out of a $40 government pension which she received. Upon her death in August of 1943, there was a balance due the County of $816.27.

July 18, 1936, these parties delivered to the County a mortgage securing a promissory note reading as follows:

"$254.09 Los Angeles, California, July 18th, 1936.

"I, We, promise to pay to County of Los Angeles, or order, at Los Angeles, California, on demand, the sum of Two hundred fifty four and 09/100 Dollars heretofore advanced, and all sums of money and all institutional care and the value of any other property or services heretofore advanced or that may be hereafter advanced by County of Los Angeles to me or us or to my or our spouse, parent, parents or minor or adult child or children or to ......

"No interest shall be payable until four years from date of the last advance made. All sums payable hereunder four years from date of the last advance made shall bear interest thereafter at the rate of seven per cent per annum until paid. All statutes of limitation on this note and mortgage securing the same are hereby forever waived. This note is secured by a mortgage upon real property.

"Matilda Ann Manaugh (sgd)
"Louis Manaugh (sgd)"

The wife conveyed the property to her half brother William J. Brown, by deed dated November 11, 1941; recorded September 1, 1943, after her death. September 28, 1943, the County notified said William J. Brown, of the balance due under the mortgage. June 7, 1944, William J. Brown and wife, conveyed it by deed to Clarence W. Brown (son of William J. Brown) and his wife, plaintiffs herein.

Negotiations for the settlement of the account failing, the plaintiffs, grantees under the last mentioned deed, brought this action against the County to quiet title. The trial court found and adjudged that the plaintiffs were the owners of the property in fee simple, subject to the mortgage, with the balance due as above stated.

Plaintiffs appeal, and urge, under a number of headings:

1. That the judgment, establishing the lien of the mortgage was error, because the claim of the County was barred by the statute of limitations.
2. That the mortgage indebtedness was remitted by legislative action.
3. That the plaintiffs were not liable in any event because they were purchasers for value and without notice of the mortgage lien.
4. That the trial court erred in admitting without proper foundation evidence of the County's book account of advances and credits with the decedents.

[1] At the beginning of a consideration of this appeal, appellants are faced with the legal proposition that in an action to quiet title in California it is the law that the mortgagor must pay the debt secured, even though it is barred by the statute of limitations. 10 Cal.Jur. 512; 17 Cal.Jur. 818; Silva v. Dias, 46 Cal.App.2d 662, 116 P.2d 496; Potter v. Entler, 71 Cal.App.2d 710, 163 P.2d 490. This is based upon the principle that one who seeks the aid of a court of equity to quiet his title to real property must do equity. And this rule applies to the grantees of a mortgagor. Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am.St.Rep. 157; Chapman v. Hicks, 41 Cal.App. 158, 182 P. 336.

[2] The note, secured by the mortgage, is for future advances. It therefore is a lien for advances made after its date. Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A.L.R. 1538.

[3] The trial court properly drew the inference that the half brother of decedent and his son knew there was an indebtedness to the County secured by the mortgage. Indeed, there can be no doubt that the decedent wife wanted this indebtedness paid before her property passed over to her half brother and his grantees. Therefore the judgment quieting title in plaintiffs subject to the mortgage indebtedness and finding the amount thereof was equitable and proper.

[4] The evidence shows that the aid furnished was general indigent aid, hospitalization and medical relief. No statute has been called to our attention whereby a County's claim for such aid has been remitted by the State. Obviously the aid here given was not under the provisions of the old age security laws, and the amendment to the California Constitution, article 16, § 12 (Chap. 58, Stats. 1939, p. 3192, Sec. 12) does not release the lien here under consideration. Appellants then argue that by Statutes of 1935, p. 1769, § 4, it was the duty of the County to record in the office of the County Recorder notice of these advances, and that, failing such recordation, plaintiffs are entitled to have their title quieted without payment of the mortgage note. However, there is nothing in the statute mentioned which in any way repealed or changed the right of the County to secure its indebtedness by promissory note and mortgage, as was done here.

[5] It is elementary law that the mortgage being of record, subsequent purchasers of the property were on notice of it, and its terms and conditions.

[6] Upon the trial appellants objected to the introduction of the account of deceased husband and wife with the County, and after its reception in evidence moved to strike it out. Prior to the enactment of the uniform business records as evidence act, this objection may have been good; but now all that is necessary is to comply with the provision of the Code. Code of Civil Procedure, Sec. 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

The witness for the County testified that the record was made and was kept in the collection file; that it was kept in the regular course of business; that the practice was to make the entries at or about the time of the act, condition or event involved, and that the account showed an itemized statement of the aid furnished to these two old people.

There was sufficient foundation for the introduction of the account, and the rulings of the trial court relative thereto were correct. Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

N. H. DEVELOPMENT CO. v. CALIFORNIA LANDS, Inc., et al.

Civ. 7282.

District Court of Appeal, Third District, California.

Jan. 31, 1947.

Rehearing Denied March 3, 1947.

Hearing Granted March 31, 1947.

Dismissed March 3, 1948.

1. Pleading 🔑53(1)

Where plaintiff pleaded in complaint and in certain counts of amended complaint the execution and delivery of irrevocable written instrument which authorized doing of acts for which damages were sought and released defendants from all claims for act of omission or commission performed under instrument, other counts in amended complaint which ignored the instrument did not state causes of action.

2. Pleading 🔑53(2)

An amended complaint, for damages for acts committed by bank and its agent in management of plaintiff's orchard at a time when plaintiff was not delinquent under deed of trust on orchard held by bank, did not state cause of action, where original complaint disclosed that plaintiff had executed written instrument authorizing bank or agent to do the acts of which plaintiff complained and providing that bank could continue to operate orchard during life of trust deed.

3. Contracts ⚷238(2)

A written instrument authorizing bank or its agent to do the acts for which plaintiff sought damages could not be modified by oral agreement. Civil Code, §§ 1625, 3346; Code Civil Proc. § 1856.

4. Pleading ⚷229

While generally courts exercise liberality in permitting amendments to pleadings and are not disposed to be unduly critical of pleadings which are inartificially drawn, where complaint is framed rather for purpose of avoiding demurrer than for purpose of stating true facts, and particularly where facts previously alleged and also alleged in other counts of the same pleading show that plaintiff cannot truthfully state a valid cause of action, defendant should not be forced to go to trial in such action or court to entertain such action.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action for trespass and damage to property by N. H. Development Company, a California corporation, against California Lands, Incorporated, a California corporation, Capital Company, a California corporation, Bank of America National Trust & Savings Association, a national banking association, Floyd Humphrey, and another. From the judgment, the plaintiff appeals.

Affirmed.

Joseph D. Taylor and Charles A. Christin, both of San Francisco, for appellant.

Rich & Weis, of Marysville, Louis Ferrari, G. D. Schilling, and S. J. Tosi, all of San Francisco, for respondents.

ADAMS, Presiding Justice.

The second amended complaint in this action, to which the trial court sustained defendants' demurrer without leave to amend, is entitled "For Trespass and Damage to Property" and contains ten counts. The first count, which purports to set forth a cause of action against the defendant bank, alleges (par. II) the ownership by plaintiff of certain described lands constituting the Rancho Golden, upon which (par. IIIA), prior to October 5, 1940, plaintiff raised oranges, olives and lemons; that (par. IV) from about October 26, 1939, said Rancho was encumbered by a deed of trust to secure two promissory notes executed by plaintiff to Bank of America, one of said notes being payable in annual installments, final payments on both being due January 2, 1943; that (par. VI) about October 5, 1940, the said bank undertook to supervise and manage the orchard on said Rancho for the purpose of additional security to it for a temporary advance made by the bank to plaintiff; that on February 20, 1941, said advance was paid to the bank and on said date plaintiff was not delinquent upon any obligation due to the bank, but that the bank continued its supervision and management until the fall of 1943; that between February 20, 1941, and November 1, 1943, said bank negligently managed the orchards in that it cut off the skirts of 7383 orange trees, failed to fertilize or irrigate properly or to remove weeds, with the result that (par.VII) the crops were reduced to the extent of some 10,438 boxes of oranges which were of a reasonable value of $10,438; that (par.VIII) the bank also failed properly to care for olive trees growing upon the Rancho, with the result that the crop which said trees were capable of producing had been reduced to plaintiff's damage in the sum of $4300; also (par. IX) that the said bank pulled out and destroyed all of the orange trees growing upon 45 acres of the Rancho, removing both good and bad trees in solid blocks, thus destroying 2622 good production trees which would have produced 22,998 boxes of oranges of a value of $22,998, and which trees could only be replaced at a cost of $17,366. Judgment was prayed against said bank on its first cause of action in the sum of $55,102.

The second count which is alleged to set forth a cause of action against Capital Company (par. I) incorporates by reference paragraphs I, II, IIIA and V of the first cause and then alleges (par. III) that about October 5, 1940, defendant California Lands, Incorporated, commenced to manage the orchards on plaintiff's lands. Acts similar to those ascribed to the bank in the first count are then alleged to have been committed by California Lands, Incorporated, with the same results to plaintiff as those alleged in the first count, a judgment for $55,102 being prayed on this count.

The third cause of action, directed against the bank only, also incorporates allegations of the first, then alleges (par. II) that about October 5, 1940, it was unable to meet the expenses of irrigation of the Rancho and secured certain advances from the bank until the proceeds of the season's crops came in; that at defendant's request it executed a document referred to as the Authorization, which is made a part of this count. Said authorization is entitled "Authorization of Trustor or Mortgagor," and reads:

"To: Bank of America National Trust and Savings Association and/or California Lands Inc.

"I, the Trustor or Mortgagor named in that certain Deed of Trust or Mortgage (Trustor or Mortgagor, shall include the successor in interest of either and when contest requires shall include the plural number), hereinafter called lien instrument dated Oct. 26, 1939, and recorded Nov. 4, 1939, in Volume 238, at Page 69 of Official Records of Butte County, State of California, hereby inform you and represent that I am, and have been financially or otherwise unable and will not be able to properly care for, farm, or operate the premises subject to said lien instrument or harvest crops therefrom. Therefore, in order that *the security underlying my indebtness to said Bank* may be protected, you are hereby requested to take over the supervision and management of the said premises, and in consideration of your doing so, the undersigned does hereby consent to your entering said premises, and at your *absolute and uncontrolled discretion* you are authorized with reference to said property, but not required:

"To lease, either the whole or any part or parts, *for such period* and upon such terms as you may elect;

"To operate, and farm either the whole or any part or parts and to the extent that, *and so long as*, you may elect;

"To harvest and sell or otherwise dispose of any and all crops produced on the premises;

"To *remove any trees*, vines, or other planting which *in your discretion* may be unprofitable to retain;

"To plant or replant any of said property to trees, vines, or other plantings;

"To repair or protect any buildings or other improvements;
and

"To perform any and all other acts as are provided in the said lien instrument to the extent that, and as long as you, in your discretion, may elect.

"Any advances or expenditures made by you as herein authorized are to be considered as advances under said lien instrument and to be secured thereby, and any returns or income derived hereunder prior to a sale of said property pursuant to the terms of said lien instrument are to be credited to my indebtedness secured thereby.

"You are authorized to use or sell or otherwise dispose of, and the undersigned hereby releases all claim to, any and all crops and feed already harvested and located on said premises, and all crops and feed now growing or hereafter produced on the premises and to any rental due or to become due, or other income hereafter derived therefrom, and *does further release you and both of you, from any and all claims by reason of any act of commission or omission performed pursuant thereto, it being the intent hereof to give you immediate, full and absolute control of the premises secured by said lien instrument.*

"You are granted hereby for the use and/or operation of said premises the right to the exclusive use and control of the chattels, personal property and farming equipment located on said premises, a list of which said chattels, personal property and farming equipment is attached hereto and made a part hereof, without liability to the undersigned for rental for the use thereof, or repair the same.

"In the event Notice of Default and of Election to Sell has been or may be recorded, as provided in said lien instrument, any advances or expenditures made or income derived hereunder, or the performance of any of the acts herein authorized, shall in no way be construed as a waiver of said Notice of Default and of Election to Sell, but such notice shall remain effective for all purposes.

"If and when this authorization is acted upon by Bank of America National Trust and Savings Association and/or California Lands Inc., then and in that event the *terms and provisions hereof shall be irrevocable on the part of the undersigned, and shall remain in full force and effect until the lien instrument is extinguished.*

"Dated at Oroville, Calif., October 5th, 1940

"N. H. Development Co.
"By: Robert W. Hodgson, Sec.-Treas.
"Noel Newton, Pres."
(Italics added.)

It is further alleged, however, that prior to the making of any advance by the bank or to any acts under the authorization the bank and plaintiff orally agreed that plaintiff would consent to the operation by the bank only until the temporary advances were repaid and until plaintiff was not in default under the trust deeds held by the bank; that the bank made the advances and assumed operation, management and supervision of the orchards, and "from on or about October 5, 1940, to on or about Nov. 1, 1943, the defendant bank operated, managed and supervised the orchards upon Rancho Golden and for that purpose entered upon the plaintiff's lands from time to time"; that about February 20, 1941, plaintiff paid to the bank all sums then due and owing and was not in default under the trust deeds; that about April 10, 1941, the bank entered the orchard "for no purpose connected with the operation, management and supervision" and pulled out and destroyed the orange trees upon 45 acres, and without plaintiff's knowledge or consent pulled out 2622 productive trees, and that one of the purposes of the bank in so doing was to cause plaintiff to default under the trust deeds so that defendant could purchase the lands at foreclosure sale for less than their reasonable market value; that the acts of the bank were done maliciously for the purpose of injuring plaintiff; that the detriment suffered by plaintiff was $131,000 for which, under section 3346 of the Civil Code, plaintiff was entitled to recover treble said amount, namely, $393,300.

The fourth cause of action, alleged to be against the Capital Company, incorporates portions of the first count, and paragraph II of the second. It then alleges that about October 5, 1940, in order to secure a temporary advance from the bank, plaintiff consented that California Lands, Inc., should act as plaintiff's agent in the operation of the Rancho orchards, and that thereafter and until November 1, 1943, California Lands, Inc., or its successor, the Capital Company, operated same as plaintiff's agent; that about April 10, 1941, under orders from the bank, defendant California Lands, Inc., pulled out the 2622 trees without plaintiff's knowledge or consent.

The fifth count, against the bank, also incorporates portions of the preceding counts and then alleges that plaintiff was lawfully in possession of the Rancho on April 10, 1941, and that on said date said defendant entered thereon and without plaintiff's consent destroyed the 2622 trees and thus became liable for treble damages.

The sixth count makes similar allegations against the Capital Company.

The seventh count, against the bank, realleges the paragraphs of the fifth, but alleges that the acts were done intentionally and maliciously.

The eighth count is directed against the Capital Company and follows the allegations of the sixth count, alleging in addition that the acts were done maliciously.

The ninth count, against the bank, alleges the portions of the third regarding the execution of the Authorization and its modification by oral agreement, and then alleges that after the payment of all advances made by the bank, and when plaintiff was not in default under any trust deed held by the bank, plaintiff notified the bank that its authority to operate the orchards had terminated, and demanded that operation be returned to plaintiff; that on February 20, 1941, the bank's authority terminated and at all times thereafter plaintiff was in possession; but that thereafter, and without plaintiff's knowledge or consent, the bank continued to enter upon the orchards, and did the wrongful acts previously complained about.

The tenth count is directed against defendants Cooper and Humphrey, and alleges that Cooper, at Humphrey's direction, and while the lands were in plaintiff's possession, entered the lands without plaintiff's leave, and cut down the 2622 orange trees to plaintiff's damage in the amount of $131,000.

To this complaint demurrers both general and special were interposed, including the bar of the statute of limitations. The trial court in sustaining the demurrer rendered a written opinion in which it stated, in substance, that the "Authorization," which had been pleaded in the original complaint, and was also set up in the third and ninth counts of the second amended complaint as having been executed by plaintiff, authorized defendants Bank of America and/or California Lands, Inc., to operate the Rancho until all of the secured indebtedness had been paid; that though plaintiff ignores the existence of the Authorization in some of the counts, and also alleges that it was modified by an oral agreement to the effect that the management of the property by the bank was to be terminated and returned to plaintiff when the temporary advances had been paid by plaintiff and that such temporary advances had been paid off before the commission of the acts for which plaintiff seeks damages, that the written instrument could not be modified by an oral agreement, that the oral agreement was therefore void, and that, as the written document was sufficient to authorize the acts alleged to have been committed by defendants, plaintiff could not state a cause of action other than one for waste by a mortgagee in possession, which plaintiff had failed to do.

The first question which calls for an answer is whether a plaintiff which has pleaded in a prior complaint and in certain of the counts of its amended complaint the execution and delivery of a written document by which it has not only authorized the doing of the acts for which it seeks damages, but has therein released defendants from all claims by reason of any act of omission or commission performed thereunder and has provided that when acted upon by defendant the terms thereof shall become irrevocable, may be permitted to contend that, because in certain counts of his amended complaint the existence of such written document is ignored, and in others it is set forth but the significant provisions thereof are alleged to have been modified by an oral agreement, the counts which ignore the writing state valid causes of action. In short, if it is apparent from the allegations in a prior pleading or in certain counts of an amended pleading that plaintiff cannot recover, are counts in such amended complaint subject to general demurrer for such reason even though they may be technically sufficient in themselves to constitute a cause of action?

The answer to this query seems to be furnished by the several decisions of the courts of this state. In Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 524, 141 A.L.R. 1358, the court said: "If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading." Williamson v. Joyce, 137 Cal. 151, 69 P. 980, was there cited. In the latter case, brought to enforce a lien for sewer work on Joyce's property, it was alleged that the warrant, diagram and assessment were recorded on March 17, 1898. It thus appeared that the action was barred by the statute of limitations, and on this ground a demurrer was sustained. Plaintiff, in an amended complaint, omitted the date of the recordation. Demurrer to such complaint was sustained without leave to amend. The Supreme Court affirmed the judgment which followed, saying that in the absence of a showing to the contrary, the court was justified in assuming that the date of recordation was correctly given in the original complaint, and in thus inferring that the complaint could not be truthfully amended so as to obviate the objection.

In Neet v. Holmes, 25 Cal.2d 447, 469, 154 P.2d 854, Mr. Justice Edmonds, in his concurring opinion, stated the rule of the foregoing cases, saying that the facts stated in each of the four pleadings filed in the suit might be considered in determining whether the bar of the statute of limitations was applicable to two specified causes of action.

In Fox Chicago R. Corporation v. Zukor's Dresses, 50 Cal.App.2d 129, 135, 122 P.2d 705, the court said that in construing the allegations of an amended complaint it was proper for the trial court and the appellate court to refer to an exhibit attached to a former pleading which exhibit plaintiff had declined to attach to the amended complaint—that in declining to attach such exhibit to the amended complaint plaintiff had not obviated the effect of the exact language of the writing.

In Zakaessian v. Zakaessian, 70 Cal. App.2d 721, 724, 161 P.2d 677 (hearing in Supreme Court denied), it was held that an essential defect in a complaint alleging the creation of a resulting trust and a vesting of legal title in plaintiff by a designated deed of conveyance, could not be cured simply by omitting any mention of such deed in subsequent statements of the same cause of action, without explanation, once it had been disclosed. In Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227, 1229, it is said: "The rule which warranted the court below in refusing leave to file the proposed amended complaint, and which finds expression in the decisions of this state, is well expressed in 31 Cyc. 422, wherein it is declared: 'As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake *as to the facts.*' To the same effect see Bank of Woodland v. Heron, 122 Cal. 107, 109, 110, 54 P. 537; Harney v. Corcoran, 60 Cal. 314; Spanagel v. Reay, 47 Cal. 608; Cox v. Rosenberg, 58 Cal.App. 181, 188, 208 P. 377; 49 C.J. 486, § 634." (Italics added.)

[1] Appellant attempts to distinguish the foregoing cases on the ground that while the rule therein stated is applicable where complaints are verified, it is inapplicable where, as here, the complaints are unverified. We see no reason for making such a distinction in this case. Plaintiff has, itself, set up, not once but several times, the execution of the Authorization, and does not anywhere deny its execution and delivery, or explain why it is omitted from certain counts. We think it was proper for the trial court to consider it as an existing document; and that plaintiff should not be permitted, by the mere expedient of filing unverified complaints, to say that the courts must disregard what it has alleged in its original complaint and in some counts of the complaint as amended and must hold that plaintiff has stated a cause of action when it is obvious that it has merely omitted that which both know to exist.

Turning now to the allegations of the first count of plaintiff's second amended complaint, it is to be noted that no mention is made therein of the Authorization, it being alleged merely that on October 5, 1940, the bank undertook to manage the Rancho orchard "for the purpose of additional security to said Bank for a temporary advance"; that said advance was paid about February 20, 1941, and plaintiff was not delinquent under the deeds of trust; but that the bank continued its management until the fall of 1943, and that while said bank was managing the orchards it committed the acts for which plaintiff claims damages.

In the first count of the original complaint—which was entitled "Trespass"—it was alleged that about October 6, 1940, plaintiff executed and delivered the Authorization to the bank, the writing being made a part thereof as an exhibit. It was then alleged that at the time the Authorization was delivered to the branch manager of the bank, it was delivered expressly upon the condition that all authority therein conferred would cease upon the repayment of said advance provided no default existed upon said notes, and that "it was orally agreed at the time of said authorization that when any advances made thereafter by the said Bank had been repaid provided no default upon said notes existed, that the supervision and management of the Rancho

Golden would be returned to the plaintiff"; that the oral agreement and conditions made at the time of delivery of the Authorization modified its terms; that after the delivery of the Authorization the bank advanced funds, and that "forthwith after the execution of said authorization, acting under and pursuant to said authorization," California Lands, Inc., proceeded to operate the Rancho "as the agent of plaintiff." Payment of advances made by the bank on February 20, 1941, was then alleged, that a demand was made for return of the lands to plaintiff, but that about April 10, 1941, California Lands, Inc., entered upon the lands without the knowledge or consent of plaintiff and committed the acts for which damages are prayed.

[2] It thus appears that the execution and delivery of the Authorization by plaintiff, and the subsequent operation of the orchards by California Lands, Inc., were alleged in the first count of the original complaint, but that, without any explanation or reasons given, all reference to the writing was omitted from the first count of the second amended complaint. Under the authorities above cited the trial court was justified in considering the writing in determining whether the first count of the second amended complaint stated a cause of action, and in sustaining defendant's demurrer thereto, if the allegations in the original pleading rendered the amended one "vulnerable." In view of the broad authority given by the Authorization it is apparent that it did render the amended complaint vulnerable, since on its face, it authorized the doing of the acts of which plaintiff complains, provided that when acted upon by the bank it should become irrevocable until the lien instrument (the trust deed) were extinguished and released the bank and California Lands, Inc., from any and all claims by reason of any acts performed by them.

Turning next to the second count in the second amended complaint, alleged to be against the defendant Capital Company, it alleges that Capital Company, at some time prior to January 1, 1943, succeeded to the business of defendant California Lands, Inc., and agreed to assume all of its obligations and liabilities, and thereby became liable for the acts of California Lands, Inc. It then alleges the California Lands, Inc., "commenced to supervise and manage" the orchards upon the Rancho, about October 5, 1940, and thereafter negligently operated and managed same by committing the acts of omission and commission alleged against the bank in the first count. In that count no reference is made to the Authorization which was addressed to California Lands, Inc., as well as the bank. Therefore, this count is vulnerable for the same reasons that the first is assailable.

The third cause of action, which purports to be against the bank, follows in substance the allegations of count one of the original complaint in that it sets forth the execution and delivery of the Authorization but alleges its modification by oral agreement, the payment to the bank of all advances and amounts due February 21, 1941, under the deeds of trust, the entry of the bank upon the orchard on April 10, 1941, and the doing maliciously of the acts of destruction of the orange trees, thus inflicting damages for which plaintiff claims treble damages under Civil Code section 3346. This count presents the additional question whether, in view of the Authorization, plaintiff states a cause of action by averring its modification by oral agreement in the manner stated, or whether it is subject to general demurrer on the ground that the writing could not, validly, be so modified.

Respondent contends that such attempt on the part of plaintiff to vary the terms of the writing by an oral agreement violates the rule provided by Civil Code section 1625, that plaintiff's allegations regarding such a modification cannot be relied upon in the pleading to nullify the statements in the writing which gave the bank and California Lands, Inc., authority to perform the acts of which plaintiff complains, as long as they might elect, which released them from all claims by reason of any act performed pursuant thereto, and was rendered irrevocable until the lien instrument therein mentioned was extinguished.

Section 1625 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." And section 1856 of the Code of Civil Procedure reads: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings; 2. Where the validity of the agreement is the fact in dispute."

It is stated in 6 Cal.Jur., pp. 261, 262: "As a general rule, preliminary negotiations leading up to a contract, and not embodied in it constitute no part of the final binding contract, and its legal effect cannot be changed by reference to them. When the terms of an agreement have been reduced to writing, no evidence of other negotiations or terms is admissible. It must be presumed, in the absence of fraud, accident or mistake, that the entire negotiations of the parties are included in the contract as executed. The written contract must control as to all the terms expressed in it; and if there is any difference between it and the oral agreement, the document must be referred to in order to determine the rights of the parties." It is also stated therein at page 264 that: "The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or vary, a written contract, applies not only to the letter of the document, but also to its legal effect."

In Pacific States Securities Co. v. Steiner, 192 Cal. 376, 377, 220 P. 304, 305, it was contended that the purchase price of an automobile purchased under a written contract had been reduced by an oral agreement. The court said that the effect of the oral agreement was directly to contradict the express terms of the written contract, and that "A written contract cannot be modified by a contemporaneous oral agreement in directing conflict therewith between the same parties (Civ.Code § 1625; Code of Civ.Proc., § 1856)"; that "This is a rule of substantive law. Germain Fruit Co. v. J. R. Armsby Co., 153 Cal. 585, 96 P. 319; Dollar v. International Banking Corp., 13 Cal.App. 331, 343, 109 P. 499; Harding v. Robinson, 175 Cal. 534, 540, 166 P. 808."

In Bank of America, etc., Association v. Pendergrass, 4 Cal.2d 258, 264, 48 P.2d 659, it was again stated that the rule set forth in the above mentioned code sections is one of substantive law, as well as of evidence. Also see Lindemann v. Coryell, 59 Cal.App. 788, 791, 212 P. 47; Harding v. Robinson, 175 Cal. 534, 540, 166 P. 808.

In Urban v. Yoakum, 89 Cal.App. 202, 208, 264 P. 493, 495, where a writing provided for dates of payment, there was testimony that, in conversations both before and after the signing of a writing it had been agreed that payments could be made upon receiving thirty days' notice, which statement was in conflict with the terms of the writing. The trial court struck out the testimony and the appellate court said: "As to the conversation held before the contract was signed, it was merged in the contract. Civ.Code, § 1625. As to the conversation held after the contract was signed, it could not alter the written instrument. Civ.Code, § 1698."

In Fisk v. Casey, 119 Cal. 643, 645, 51 P. 1077, on appeal it was assigned as error that the trial court had refused defendant permission to amend his answer by alleging, as a separate defense, that at the time of the execution of a promissory note made by defendant, plaintiff agreed to pay all taxes thereafter to be assessed upon the land, including taxes on the mortgage. The court held there was no error; that the promissory note was a written agreement to pay interest, which could not be varied by proof of this averment.

In Ventura, etc., Ry. Co. v. Hartman, 116 Cal. 260, 48 P. 65, 66, an action brought to compel the payment by defendant of a stock assessment, the complaint contained a copy of defendant's subscription. In this complaint plaintiff alleged that defendant had thereby agreed to pay his subscription "when and as it might be demanded by said plaintiff." The court said that no such provision was contained in the subscription and such language in the complaint should be disregarded.

[3] While as set forth in 6 Cal.Jur., pp. 264–268, §§ 166 and 167, there are exceptions to the parol evidence rule, the facts alleged do not bring plaintiff within any of such exceptions, and it is obvious that the alleged oral agreement is directly in conflict with the written one executed by plaintiff, which is complete and unambiguous as to the matters which plaintiff claims were changed by parol agreement. Plaintiff's third cause of action is predicated upon and dependent upon the alleged oral agreement, and since that agreement, as matter of substantive law, is invalid, it follows that plaintiff fails to state a cause of action in said count.

The fourth count, which is alleged to be against the Capital Company, incorporates portions of first and second counts including prior allegations of assumption by Capital Company of the liabilities of California Lands, Inc., then alleges that about October 5, 1940, in order to procure a temporary advance from the bank plaintiff consented that California Lands, Inc., should act as *plaintiff's agent* in the management of the orchard, and that California Lands and Capital Company operated and managed the orchards until November 1, 1943, as plaintiff's agent; that about April 10, 1941, California Lands, Inc., was instructed by the bank to destroy all of the orange trees on 45 acres, it being further alleged that said acts were done "wilfully" by defendant, thus justifying recovery of treble damages for the injuries inflicted. This cause of action, appellant states in its brief, was designed to afford relief to plaintiff in the event that it appeared from the evidence that California Lands was responsible for the alleged wrongful acts.

The fifth, sixth, seventh and eighth counts, appellant states, are simple causes of action for trespass or trespass on the case committed by the different defendants. All of said counts allege liability on the part of defendants for treble damages under sections 3346 of the Civil Code and section 733 of the Code of Civil Procedure.

The ninth cause of action again sets forth the execution of the Authorization, the alleged oral agreement, the assumption of operation by the bank, and, by incorporating by reference a portion of the third count, alleges that "from on or about October 5, 1940, to on or about November 1, 1943, the Bank operated, managed and supervised the orchards upon Rancho Golden and for that purpose entered upon the plaintiff's lands from time to time." Said ninth count further alleges that after payment of all advances to the bank and when plaintiff was not in default under any trust deed, it notified the bank that its authority to operate the property had ceased, and demanded that same be returned to plaintiff; that plaintiff was in possession on February 20, 1941, and at all times thereafter, but that the bank continued to enter upon the orchards, without plaintiff's knowledge or consent, and intentionally and maliciously caused California Lands, Inc., to destroy trees, etc. This ninth count differs from the third count in that the latter did not allege that under the oral agreement the authority of the bank to manage the orchards had terminated on February 20, 1941, as does the former; nor did the third count allege that plaintiff was in possession when the trees were pulled, though the ninth alleges both that plaintiff was in possession and that the bank continued to operate the lands until November 1, 1943.

It is apparent from the foregoing lengthy statement of the repetitious and extensive allegations of the foregoing counts of plaintiff's complaint that all of said causes of action are grounded upon the asserted oral amendment of the written Authorization; that the execution of the latter is nowhere denied, and that no imperfection or mistake in same is put in issue. Plaintiff has not attempted to set forth causes of action for any acts of omission or commission committed in connection with the management of the property *under* the Authorization, and since we conclude that the oral agreement was invalid as matter of substantive law, plaintiff has failed in any of such counts of its complaint to state a good cause of action in view of the provisions of the Authorization which it executed and delivered to defendants.

Regarding the tenth count which charges that on April 10, 1941, defendant Humphrey directed defendant Cooper to enter upon plaintiff's lands and to cut down orange trees and that Cooper, pursuant to said direction, cut down 2622 of such trees, reference to the seventh count of plaintiff's original complaint shows that plaintiff therein alleged that Humphrey was the manager of the Oroville branch of defendant bank, and that he directed California Lands, Inc., to cut the trees. The eighth count of that complaint incorporated paragraphs I to XIV of the first count thereof—which paragraphs included the allegations regarding the execution and delivery of the Authorization—and then alleged that Humphrey, Cooper and California Lands, Inc., trespassed upon the lands and destroyed the 2622 orange trees. The original ninth cause of action, against Cooper alone, alleged that on or after February 20, 1941, Cooper undertook to manage the orchard, and that he cut off the skirts of the orange trees, failed to irrigate properly, etc. In its first amended complaint plaintiff also alleged that Humphrey was the manager of the bank's Oroville branch, and that Cooper was instructed by Humphrey to pull out the 2622 trees; also that Humphrey was acting within the scope of his authority in giving such order. It is thus apparent that in framing its tenth count plaintiff sought to avoid any infirmity growing out of the Authorization by omitting to allege, what it had previously revealed, that Humphrey was the manager of the Oroville branch of the bank, and that in directing Cooper he acted within the scope of his authority as such manager. These facts bring this count within the decisions hereinbefore cited. Also see Johnson v. Nolan, 105 Cal.App. 293, 294, 288 P. 78, where plaintiff sought to avoid the statute of limitations by omitting, in an amended complaint, the date of the acts for which damages were sought. The court there said: "In passing on the last demurrer the trial court, in the absence of a showing to the contrary, was justified in assuming that the date of the wrongful act was correctly set forth in the original complaint and to rule accordingly. Williamson v. Joyce, 137 Cal. 151, 152, 69 P. 980. Furthermore, the defendant's special demurrer was addressed to the date. If the date had been inserted, the plea of the statute was good. If the date was omitted, the special demurrer was good. The plaintiff may not complain in either event."

[4] While it is generally true that courts exercise liberality in permitting amendments to pleadings and are not disposed to be unduly critical of those inartificially drawn, where it appears that a complaint is framed rather for the purpose of avoiding demurrer than for the purpose of stating the true facts, and particularly where facts previously alleged, and also alleged in other counts of the same pleading show that a plaintiff cannot truthfully state a valid cause of action, defendants should not be forced to go to trial in such actions nor courts to entertain them.

The judgment is affirmed.

THOMPSON, J., and LEMMON, Justice pro tem., concur.

77 Cal.App.2d 770

JONAS et al. v. LELAND et al.

Civ. 13109.

District Court of Appeal, First District, Division 1, California.

Jan. 25, 1947.

Hearing Denied March 24, 1947.

1. Specific performance 🔑57

An agreement concerning sale of property providing that vendor would repair and redecorate and that purchasers should have option of accepting property when ready or right to apply deposit on another building, purchasers' action for specific performance could not be defeated on ground that there was no mutuality of obligation, since agreement was not one of sale, but merely an option contract for purchase of the property.

2. Vendor and purchaser ⚷3(4)

The distinction between a "contract to purchase or sell" real estate and an "option to purchase" is that the contract to purchase or sell creates a mutual obligation on one party to sell and the other to purchase, while an option merely gives right to purchase within a limited time without imposing any obligation to purchase.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract to Purchase", "Contract to Sell" and "Option to Purchase".

3. Vendor and purchaser ⚷18(4)

Where vendors under agreement to sell property were to repair and redecorate and agreement gave purchasers option of accepting property when ready or right to apply their deposit on another building, but vendors failed to put premises in condition for occupancy, the option never expired and attempted withdrawal by vendors was a nullity.

4. Vendor and purchaser ⚷18(1)

It is no objection to validity of an option contract that holder of option is under no obligation to exercise it.

5. Specific performance ⚷6

Where agreement to sell property is signed by only one of parties, party who did not sign can bring suit for specific performance and thereby make the remedy mutual, provided party who did sign has not previously withdrawn from agreement.

6. Vendor and purchaser ⚷18(4)

If option to purchase realty is irrevocable, there can be no valid withdrawal from agreement.

7. Specific performance ⚷6

There is no mutuality of remedy in an option contract until acceptance of option, but upon acceptance there is created a contract of sale which gives rise to remedy for specific performance.

8. Specific performance ⚷6

Where contract for purchase of property provided that vendors would repair and redecorate, that deal would be closed when building was ready for occupancy and that purchasers should have option of accepting property or of applying deposit on another building, but vendors never put premises in condition for occupancy, purchasers' suit for specific performance constituted acceptance of option, and suit could not be defeated on ground that there was no mutuality of remedy, although until suit was brought there had been nothing but an option contract.

9. Specific performance ⚷129

Where agreement for sale of property provided that vendors would repair and redecorate and that deal would be closed when building was ready for occupancy, a promise to make property ready for occupancy within a reasonable time could be implied so as to entitle purchasers, in suit for specific performance, to damages for period during which they were deprived of use of property subsequent to date of vendors' refusal to complete repairs.

10. Specific performance ⚷129

Even where specific performance is granted, court may award in addition such damages as plaintiff is lawfully entitled to by reason of delay in performance.

11. Specific performance ⚷126(2)

In suit for specific performance of agreement to purchase property under which deed was not to be delivered until balance of purchase price had been paid, judgment requiring delivery of possession within five days and substituting a contract for installment payments for parties' agreement was improper.

12. Specific performance ⚷126(2)

Equity enforces performance of contract only as it is made and is without power to make a new contract.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action for specific performance by Reginald H. Jonas and another against Herbert Leland and others. Judgment for the plaintiffs and the defendants appeal.

Judgment modified and, as so modified, affirmed.

Cerf, Robinson & Leland, of San Francisco, for appellants.

Shirley, Robb & Saroyan and Dudley T. Shearer, all of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment rendered in favor of the plaintiffs in an action for specific performance against defendants Herbert Leland, Max F. Robinson Realty Company, and Max F. Robinson, an individual, doing business as Max F. Robinson Realty Company.

A Uniform Agreement of Sale and Deposit Receipt, adopted by the Real Estate Association of San Francisco, was used as the basis of a contract between the parties relative to the sale of a five room unit and a three room unit, known as 1740 Lyon Street. On October 5, 1943 plaintiffs deposited $500 on the purchase price.

The conditions of sale are set forth in an exhibit, "A", as follows: "Buyer to pay One Thousand Dollars ($1,000.00) In Cash as the down payment and assume a first loan by a loaning institution in the amount of Two thousand one hundred ($2,100.00) bearing interest at the rate of six percent and payable in monthly instalments of twenty three 30/100 dollars ($23.30) monthly which is to apply on the interest and reduce the principal. Also is to assume a loan in the amount of Two thousand one hundred and fifty Dollars ($2,150.00). This loan is to bear interest at the rate of ten percent and is to be payable in monthly instalments of Sixty five dollars which is to apply on the interest and reduce the principal. * * * The decision of any local title insurance company shall be accepted as final by both purchaser and seller as to all questions affecting the title and purchaser agrees to accept a title insurance policy issued by any such company as conclusive evidence of the condition of the title. If said purchaser shall fail to comply with any conditions at the time or in the manner herein provided for, said seller shall be released from all obligations hereunder. In that event all rights hereunder, legal and equitable, of said purchaser shall cease, and said deposit shall be retained by said seller, as liquidated and agreed damages; or said seller may, if he so elects, apply said deposit on account of the purchase price of said property and enter suit against said purchaser to compel the specific performance of this contract." On the reverse side of the exhibit the following appears: "This property is now being redecorated, interior and exterior, and put in repair. The work is now in progress and the buyer may choose the color scheme they desire also have the choice of wallpaper. Samples offered them by Max F. Robinson. The cost of all repairs, reconditioning, and redecorating is to be paid by the sellers. The buyers are to close the deal when the building is ready for occupancy. * * * The buyers shall have the option of accepting the property when ready or shall have the right to refuse to accept and apply the deposit herein on another building offered by Max F. Robinson for sale." It was agreed that the buyers were to pay for linoleum, a water heater and hardwood floors. Plaintiffs placed some furniture in the premises.

The principal contention presented is that the place was not put in condition for occupancy. In this connection it is claimed that the painting of the downstairs rooms was not completed; that the water heater was not connected; that the toilets overflowed when flushed, and that there were other plumbing repairs necessary. The testimony of the seller Robinson is to the effect that the reason for the failure to close the deal was due to the plaintiffs' lack of money. The determination of the true reason is a factual matter.

Upon substantial evidence the court found "That plaintiffs, and each of them, were at all times, from and after October 5, 1943, ready and willing to perform all covenants and terms of said agreement on their part to be performed; that defendants neglected to place said premises in a condition 'ready for occupancy' under the terms of said agreement, within a reasonable time; that at all times subsequent to April 20, 1944, defendants refused and neglected to take further steps to place said premises in a condition ready for occupancy; by reason of said refusal and neglect of defendants to have such premises in a condition ready for occupancy within a reasonable time, i.e., by April 20, 1944, plaintiffs have been deprived of the occupancy and possession of said premises, to their damage in the sum of $60.00 per month, from and after April 20, 1944. That plaintiffs are ready and willing to accept said premises in their present condition, and will at their own expense, place said premises in a condition for occupancy. That defendants, at the request of plaintiffs, did certain work on said premises including placing hardwood floors, and linoleum, in the sum for $259.99, for which plaintiffs have agreed to reimburse defendants."

The conclusions of law are in conformity with the findings and the judgment. The judgment provides "That the agreement * * * be specifically performed; and that the defendants, within five days from the date of this judgment deliver the sole and exclusive occupancy and possession of the premises at 1740 Lyon Street, in the city and county of San Francisco, hereinafter more particularly described, to said plaintiffs. That within ten days from the date of this judgment, plaintiffs pay to the defendant the sum of $259.99 as and for reimbursement for improvements on said premises, plus taxes on said property from the 20th day of April, 1944, and a further sum equal to any interest accrued on any outstanding indebtedness against said property since the 20th day of April, 1944, and the additional sum of $1,000 as a down payment; less, however, the sum of $60 per month for each month since April 20, 1944, being the amount of damages which the plaintiffs are hereby adjudged to be entitled to for the reasonable value of the use and occupancy of said premises for the period from and after April 20, 1944. That upon completion of the payment of the monthly installments called for in the said Agreement, namely: $23.50 per month to apply on an obligation of $2100 bearing interest at the rate of 6% per annum, said monthly payments to apply on interest and to reduce the principal; The further sum of $65 per month to apply on a loan of $2150 bearing interest at the rate of 10% to apply on the interest and principal, said interest to be computed on the balance of the principal remaining due, as reduced each month. The defendants shall, within ten days after the completion of said payments of said two loans totalling $4250, execute and deliver to the plaintiffs a good and sufficient conveyance in fee, conveying to plaintiffs a good and marketable title to said property at 1740 Lyon Street, in the city and County of San Francisco, state of California."

About May 26, 1944, the matter was placed in the hands of the buyers' and sellers' respective attorneys. This resulted in numerous communications, setting forth divergent views on the facts and the law. The letters were carefully prepared with evident thought that litigation was imminent.

[1] Appellants declare that no cause of action could arise based on the contract as there was no mutuality of obligation. This contention is based upon the paragraph appearing on the reverse side of exhibit "A" and heretofore quoted, which paragraph reads: "The buyers shall have the option of accepting the property when ready or shall have the right to refuse to accept and apply the deposit herein on another building offered by Max F. Robinson for sale." Appellants contend that this promise by the buyers is too indefinite to be enforceable, and therefore, since it did not impose any legal duty upon the buyer, such promise could not be determined to be a consideration for appellants' promise to sell. Appellants conclude therefore they had the right to withdraw their offer any time before its acceptance by the buyers.

In this connection, appellants cite a number of cases, none of which are definitely in point. They seek to support their argument by analogy to those cases wherein the court has held contracts for real estate brokers' commissions to be unenforceable where such contracts did not contain a definite description of the property to be sold. Glazer v. Hanson, 98 Cal.App. 53, 276 P. 607; Proulx v. Sacramento Valley Land Co., 19 Cal.App. 529, 126 P. 509; Craig v. Zelian, 137 Cal. 105, 69 P. 853; Restatement of the Law, Contracts, p. 88, sec. 79. In the Restatement it is said: "A promise or apparent promise which reserves by its terms to the promissor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for."

[2] Appellants misinterpret the legal effect of the agreement in the present case. Their whole argument is based on the conclusion that the agreement is one for the sale of the premises in question, or, in the alternative, for the sale of another building of the sellers'. There is present in this case merely an option contract for the purchase of the said premises. The agreement of sale and deposit receipt would have constituted a binding agreement of sale were it not for the added provisions set forth on the reverse side thereof. Laack v. Dimmick, 95 Cal. App. 456, 273 P. 50. As stated in Menzel v. Primm, 6 Cal.App. 204, 209, 91 P. 754, 756: "'The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase.'"

[3, 4] The term of this option was to run from the date of the agreement until the premises were ready for occupancy, and the consideration for such option was the purchasers' agreement that if they did not accept the premises in question they would apply the deposit on another building offered by the sellers. Upon acceptance, the buyers would become bound by the terms and conditions set forth in the sale agreement. In other words, the buyers actually were giving their promise to buy at least some property from the sellers in consideration for the option to purchase the property in question. The option was irrevocable until the time set for its termination. As stated, the trial court found "that at all times subsequent to April 20, 1944, defendants refused and neglected to take further steps to place said premises in a condition ready for occupancy." Under such circumstances the terms of the option never expired and the attempted withdrawal by the sellers was a nullity. The contract sought to be specifically performed is the agreement of sale of the premises in question, which came into being upon acceptance of the option. It is no objection to the validity of an option contract that the holder of the option is under no obligation to exercise it. Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522.

There was consideration for the option given here. The buyers had the right either to accept the property when ready, or to refuse to accept in which case they had the right to have the $500 applied on another building offered by the seller. In the present case there was more than just a voluntary continuing proposal. It was rather an irrevocable offer for the term stated and therefore an option in the true sense.

The defendants next contend that the plaintiffs were not entitled to specific performance of the agreement as there was no mutuality of remedy. In this connection they argue that since they could not have had specific performance of this contract against the buyers, then the buyers likewise cannot have specific performance against them. They also contend that, even though the buyers by bringing the present suit have made the remedy mutual, still this is immaterial where the other party to the agreement, as here, has previously withdrawn from such agreement.

[5-7] In effect, all that has been said above would apply likewise to this contention. Where there is an agreement to sell a certain piece of property and such agreement is signed by only one of the parties thereto, and therefore seemingly lacking in mutuality of remedy, the party who did not sign can bring a suit for specific performance and thereby make the remedy mutual. If the party who did sign has previously withdrawn from such agreement, the rule has no application. Nason v. Lingle, 143 Cal. 363, 77 P. 71. However, this rule has no application herein, as this agreement is merely an option contract. In such case, there is never mutuality of

remedy until the acceptance of the option. If the option is irrevocable there could be no valid withdrawal. Copple v. Aigeltinger, 167 Cal. 706, 140 P. 1073, distinguishing Nason v. Lingle, supra. Upon the acceptance of the offer by the buyer, there is then created the contract of sale, and it is this contract that gives rise to the remedy for specific performance. Smith v. Bangham, supra.

[8] In the present case the trial court found, and the evidence supports the conclusion, that the sellers never put the premises in condition for occupancy. The bringing of this suit for specific performance by the buyers constitutes their acceptance of the option within the prescribed term thereof. Copple v. Aigeltinger, supra. At the buyers' request, the vendors expended money for the improvements; still such improvements benefited them in the long run as they still owned the property. In such a case the reason for the application of the doctrine of estoppel is absent as the element of detriment is not clearly present.

[9, 10] The portion of the judgment giving respondents the right to deduct $60 per month for each month since April 20, 1944, being damages for the deprivation of the use of the property since that date, is not erroneous. On the reverse side of the agreement appears the following: "The property is now being redecorated, interior and exterior, and put in repair. The work is now in progress and the buyer may choose the color scheme they desire also have the choice of wallpaper. Samples offered them by Max F. Robinson. The cost of all repairs, reconditioning, and redecorating is to be paid by the sellers." A promise on behalf of the vendors to make the property ready for occupancy within a reasonable time could be implied as part of the option agreement. In other words, the sellers offered the property to the buyers upon certain terms and as part of such offer they impliedly promised to have the property ready for occupancy within a reasonable time. "Even where specific performance is granted, the court may award in addition such damages as the plaintiff is lawfully entitled to by reason of delay in performance." Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425; Coleman v. Dawson, 110 Cal.App. 201, 294 P. 13.

[11] Appellants argue that the judgment made a new agreement for the parties rather than enforce the agreement as written. They point out that under the judgment they were to deliver the sole possession of the property to respondents within five days from the date of the judgment without any further payments on the purchase price, while under the agreement possession was to be delivered the day following the date of recordation of the deed, which deed was not to be delivered until the balance of the purchase price had been paid, and that they were to convey the property to respondents in fee within 10 days after the completion of the payments of the two loans totaling $4,250. Under the agreement the buyers were to assume two loans and to give certain security for such loans. The first loan was to be from a lending institution, and the second from the sellers. The court by its judgment changed the terms of the agreement from providing for personal loans, with the property as security, to just a contract for installment payments, with the seller retaining the title as security.

[12] Equity enforces performance of a contract only as it is made; a court has no power to make a new contract. Appellants are entitled to have the judgment modified so as to correspond with their agreement. Gittelson v. McKnight, 75 Cal. App. 698, 704, 243 P. 889. The trial court is directed to modify the findings and judgment as herein indicated. As so modified the judgment will stand as affirmed. On this appeal each side will pay its own costs.

PETERS, P. J., and SCHOTTKY, J., pro tem, concur.

Application of CARR.
In re PAIVA.*
Civ. 7309.

District Court of Appeal, Third District, California.

Jan. 25, 1947.
Rehearing Denied Feb. 13, 1947.
Hearing Granted Feb. 20, 1947.

1. Criminal law ⚿997

Proceeding in coram nobis to vacate judgment of conviction was an independent cause for extraordinary remedy to set aside judgment as void for extrinsic fraud, dependent upon proof of material facts which were not adduced or considered by the court at the trial of the criminal case, and which, if adduced, would have required rendering of a different judgment.

2. Criminal law ⚿1077

A proceeding in coram nobis to vacate judgment of conviction was civil in its nature and not criminal, and hence petitioner was not entitled to reporter's transcript of evidence at expense of county for purpose of appeal after writ was discharged. Code Civ.Proc. §§ 274, 953a, 953b.

3. Criminal law ⚿997
Judgment ⚿334

The writ of error coram nobis is available under proper circumstances to set aside a judgment, when there is no other adequate remedy and is applicable to either criminal or civil judgments.

4. Criminal law ⚿1023(12)

A judgment denying a petition for writ of error coram nobis and affirming the judgment it is sought to vacate by that proceeding is appealable. Code Civ.Proc. § 963.

5. Criminal law ⚿1023(12)

An appeal will lie from an order, made after final judgment in coram nobis proceeding, denying petitioner's application for an order of court requiring the transcription of evidence. Code Civ.Proc. §§ 953a, 953b, 963.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding in the matter of the application of Arthur De Beau Carr, on behalf of Siverino Paiva for writ of error coram nobis and the writ of habeas corpus. At conclusion of trial on petition for the writ of error coram nobis, the writ was discharged and judgment of conviction was affirmed. The petitioner filed a written notice of appeal together with a notice for preparation of the transcript of evidence. From an order refusing to direct payment for the transcript from the county treasury, the petitioner appeals.

Affirmed.

Arthur De Beau Carr, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., Jas. O. Reavis, Deputy Atty. Gen., John Quincy Brown, Dist. Atty., and John B. Heinrich, Deputy Dist. Atty., both of Sacramento, for respondent.

THOMPSON, Justice.

After a judgment of conviction of Siverino Paiva for the crime of murder had been affirmed on appeal in August, 1935 (People v. Paiva, 9 Cal.App.2d 10, 48 P.2d 174), petitioner filed on August 26, 1946, in the Superior Court of Sacramento County a petition, in behalf of said defendant, for a writ of error coram nobis, to vacate the judgment. That proceeding was duly tried. At that hearing oral evidence was adduced and recorded by the official court reporter. At the conclusion of that trial the writ was discharged and the judgment of conviction was affirmed. The petitioner filed a written notice of appeal together with a notice for preparation of the transcript of evidence as required by Section 953a of the Code of Civil Procedure. No undertaking to secure the payment of the cost of transcript was filed as required by Section 953b of said code. The county clerk therefore declined to order the transcription of the evidence.

On the theory that the proceeding in coram nobis, to vacate a judgment, is a criminal action which would entitle petitioner to the reporter's transcript for the purpose of appeal, to be paid for "out of the county treasury", as provided by

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* Subsequent opinion 190 P.2d 604.

Section 274 of the Code of Civil Procedure, he applied to the trial court for an order to that effect. An order to show cause why the transcript should not be furnished was thereupon served on the County Clerk. The order to show cause was heard by said Superior Court on June 14, 1946. Both parties were represented by counsel. After hearing and arguments the court determined that the proceeding in coram nobis is a civil and not a criminal cause, and that the court was not authorized to order the transcript to be prepared at the expense of the county under Section 274 of the Code of Civil Procedure. The court then made its order determining that petitioner was entitled to the transcript at his own expense and not at the expense of the county. From that order the petitioner gave notice of appeal to this court. The notice of appeal is from that portion of the order which determines that the proceeding in coram nobis is a civil cause and not a criminal case, and which refuses to direct payment for the transcript from the county treasury.

[1-3] We are of the opinion that the proceeding in coram nobis was an independent cause for extraordinary remedy to set aside the judgment of conviction of Siverino Paiva, as void for extrinsic fraud, dependent upon proof of material facts which were not adduced or considered by the court at the trial of the criminal case, and which, if adduced, would have required the rendering of a different judgment; that the coram nobis proceeding is civil in its nature, and not criminal, in spite of the fact that it sought to vacate the judgment of conviction in a criminal case. The trial court therefore properly held that petitioner was not entitled to the reporter's transcript at the expense of the county. Secs. 274 and 953a, 953b, C.C.P. The great weight of authority determines that a writ of error coram nobis is a civil proceeding, and not a criminal case. State v. Gentry, Ind.Sup., 62 N.E.2d 860, 161 A.L.R. 532; 24 C.J.S., Criminal Law, § 1606a, p. 144; 2 Am.Jur. p. 845, sec. 4; 3 Am.Jur. p. 766, sec. 1276; 31 Am.Jur. p. 322, sec. 799, and p. 328, sec. 814. The writ is available under proper circumstances, to set aside a judgment, when there is no other adequate remedy, and is applicable to either criminal or civil judgments. 34 C.J. 392, sec. 603. In Section 605 of the last-cited authority it is said: "A writ of error coram nobis lies for an error of fact, not appearing on the face of the record, which fact was unknown to the court, and which, if known in season, would have prevented the rendition and entry of the judgment challenged."

In 24 Corpus Juris Secundum, Criminal Law, § 1606, at page 144, it is said: "A proceeding for a writ of error coram nobis or its statutory equivalent is in the nature of a new, civil suit, not unlike a bill of review to have reviewed a decree in chancery, and has a function closely analogous to a motion for a new trial, although it cannot be substituted therefor. The writ supplements, but does not supersede, the remedy provided in the statute for the granting of new trials or the correction of errors. It is generally held applicable in criminal as well as civil cases although there is authority to the contrary."

In the Gentry case, supra, after judgment of conviction of murder had been rendered against the defendant Stephenson, he sought to vacate that judgment by means of a writ of error coram nobis. A motion for a change of venue was denied on the theory that it was a part of the original criminal action. Upon review of a petition for a writ of mandate to compel the trial court to grant the change of venue, the Supreme Court of Indiana, quoting with approval from State v. Spencer, 219 Ind. 148, 41 N.E.2d 601, said with relation to the proceeding in coram nobis:

> " 'Under the great weight of reason and authority, the petition for the writ of error coram nobis must be considered a new proceeding, civil in nature,—a remedy by which relief may be had from an unconscionable judgment.'
>
> "* * * Under the common law it was not triable by jury and since under our constitution only those actions are triable by jury which were so triable by common law or so made by statute, a jury cannot be demanded or awarded.

"We have repeatedly held that a coram nobis proceeding is in the nature of a motion for new trial and that it is also in the nature of a civil action. It is in the nature of the former because its object is to secure the setting aside of a judgment and a retrial of the matter upon which judgment had been rendered. It is in the nature of the latter because it presents a new and different cause for trial wherein the burden of proof is on him who requests relief from the judgment. It is not a trial of the original cause, but merely a determination of whether or not some fact or facts were in existence but unknown to the moving party and to the court which, if known, would have caused the court to rule differently.

"While in the instant case the judgment involved is one rendered in a criminal cause, the purpose of the proceeding is to set aside the judgment and it is immaterial that the judgment is the outcome of a criminal action. We do not believe that it can be classified as a criminal action merely because it attacks a judgment obtained in that kind of case, and as a civil action when attacking a civil judgment." [62 N.E.2d 861.]

We conclude that this proceeding for a writ of error coram nobis is civil in its nature, and not criminal, and that the trial court, therefore, properly refused to order the county clerk to have the transcript of evidence prepared at the expense of the county. The petitioner, however, will be entitled to a transcript of the evidence and proceedings, at his own expense, when he conforms to the provisions of the statute in that regard.

[4] We are of the opinion that an appeal lies under Section 963 of the Code of Civil Procedure from a judgment denying a petition for error coram nobis and affirming the judgment which is sought to be vacated by that proceeding. If the coram nobis proceeding is a civil action, as we have held that it is, it would follow that an appeal would lie from a final judgment therein under said section of the code. Our courts have repeatedly recognized the right of appeal from a judgment which was rendered in a proceeding in coram nobis to vacate a former judgment of conviction in a criminal case. People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Butterfield, 37 Cal.App.2d 140, 99 P.2d 310; People v. Zolotoff, 48 Cal.App.2d 360, 119 P.2d 745; People v. Kretchmar, 23 Cal.App. 2d 19, 72 P.2d 243. In the Gilbert case, supra, 25 Cal.2d at page 439, 154 P.2d at page 666, the Supreme Court said:

"The People, with more regard for established processes, classify the defendants' motions [to set aside or modify a judgment imposing the death penalty for murder] as constituting applications for relief in the nature of writs of error coram nobis. We are in accord with this classification."

[5] Assuming that the writ of error coram nobis is a proceeding separate and distinct from the original trial which resulted in the judgment sought to be vacated, and that an appeal lies from the judgment granting or denying the writ, it follows that an appeal would also lie from the order made after final judgment in the coram nobis proceeding denying petitioner's application for an order of court requiring the transcription of evidence as provided by Sections 953a and 953b of the Code of Civil Procedure. Section 963 of the Code of Civil Procedure provides that an appeal may be taken "from any special order made after final judgment."

The order denying petitioner's application for an order of court to require the transcription of evidence at the expense of the county is affirmed.

ADAMS, P. J., and PEEK, J., concur.

77 Cal.App.2d 840

FARRAND v. FARRAND.

Civ. 15575.

District Court of Appeal, Second District,
Division 2, California.
Jan. 29, 1947.

1. Divorce 🔑27(15)

Mere drunkenness of one spouse is not such cruelty as to entitle the other to a divorce on the ground of cruelty.

2. Divorce 🔑27(1)

To constitute "extreme cruelty" sufficient to support a decree of divorce when no bodily harm is involved, there must be a showing that the offending spouse's conduct has caused the plaintiff grievous mental suffering.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

3. Divorce 🔑130

Evidence failing to show that defendant husband's intoxication caused plaintiff wife grievous mental suffering did not sustain an interlocutory divorce decree predicated on ground of extreme cruelty.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Carolyn L. Marie Farrand against Roderick Cloyer Farrand for divorce. From an interlocutory decree of divorce, defendant appeals.

Decree reversed.

Harold D. Kraft, of Los Angeles, for appellant.

Ben M. Kochman, of Los Angeles, for respondent.

McCOMB, Justice

From an interlocutory decree of divorce in favor of plaintiff predicated upon the ground of extreme cruelty, defendant appeals

Plaintiff filed a complaint for divorce in which she alleged that since the marriage of the parties defendant had treated her in a cruel manner and had inflicted upon her grievous mental suffering and anguish. No specific acts of cruelty were alleged.

The only question necessary for us to determine is:

Was there substantial evidence to support plaintiff's allegation that defendant had treated her in a cruel manner and inflicted on her grievous mental suffering and anguish?

This question must be answered in the negative. The only evidence material to this issue was offered by plaintiff and her brother, Vinson A. Soderberg. The pertinent portion of plaintiff's testimony is as follows:

"Q. You charge that your husband was cruel to you. Of what particular matters are you complaining? A. That he drank too much, for one thing.

"Q. During the last year you lived together, how often was he actually drunk, an average of once a week or what. A. Oh, more than that, twice.

"Q. What effect did that line of conduct have on you, keep you nervous and upset? A. Yes."

Mr. Soderberg's testimony bearing on the same subject was as follows:

"Q. Do you know her husband, Roderick Farrand? A. I do.

"Q. During the year from July of 1942 to July of 1943, about how often did you see him? A. Oh, one to three times a week.

"Q. Did you ever see him drunk? A. Yes.

"Q. About how often, an average of at least once a week? A. At least."

[1, 2] It is the rule that mere drunkenness on the part of one spouse is not such cruelty as to entitle the other to a divorce on the ground of cruelty. To constitute extreme cruelty sufficient to support a decree of divorce when no bodily injury is involved, there must be a showing that the offending spouse's conduct has caused the plaintiff *grievous mental suffering.* (See Truax v. Truax, 62 Cal.App.2d 441, 443 et seq., 145 P.2d 88; Stanton v. Stanton, 113 Cal.App. 462, 464, 298 P. 524; Bennett v. Bennett, 55 Cal.App. 268, 269, 203 P. 162; 17 Am.Jur. [1938] 180, sec. 58.)

[3] It is apparent that the only evidence in the instant case bearing upon cruelty falls far short of meeting the requirements of the foregoing rules. The evidence fails to show that defendant's intoxication caused plaintiff *grievous mental suffering*. It would merely support a finding that plaintiff was "nervous and upset," which as held in Truax v. Truax, supra, 62 Cal.App.2d 444, 145 P. 2d 89, does not constitute grievous mental suffering sufficient to sustain an interlocutory decree of divorce predicated upon the ground of extreme cruelty.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

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77 Cal.App.2d 838

SANDERS v. MAGEE.

Civ. 15539.

District Court of Appeal, Second District, Division 2, California.

Jan. 29, 1947.

Hearing Denied March 27, 1947.

1. Trusts 🔑89(1)

Evidence sustained findings that realty and personalty involved were purchased individually and that defendant paid the entire purchase price from defendant's own funds, that defendant did not repudiate any agreement with plaintiff, that no agreement ever existed between parties to carry on any business as copartners or otherwise jointly, and that no agreement existed whereby defendant should hold any property in defendant's name as trustee for joint use of the parties.

2. Partnership 🔑53
Trust 🔑44(1)

In action to establish a partnership, a trust, and for an accounting, evidence sustained finding that defendant was the sole owner of all the real and personal property described in plaintiff's complaint, and that plaintiff had no right, title, or interest in and to any of the property.

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge.

Action by Erastus Neil Sanders against Margaret Magee to establish a partnership, a trust, and for an accounting. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Erastus Neil Sanders, in pro. per., for appellant.

Chauncey Gardner, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after a trial before the court without a jury in an action to establish a partnership, a trust, and for an accounting, plaintiff appeals.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

[1] First: *Was there substantial evidence to sustain these findings of the trial court?*

a) *"And the court further finds that all of said property [referring to the property described in the complaint] both real and personal, was purchased individually at about said time, and that the defendant paid the entire purchase price thereof from her own funds.* * * *

b) *"That the defendant did not repudiate any agreement, or any purported agreement, with the plaintiff; that at no time was there any agreement between the parties to engage in or to carry on any business as copartners or otherwise jointly, relative to the herein described real and personal property, or relative to any other property or any agreement wherein and whereby the defendant should hold said or any property in her name, as trustee, for the joint use and benefit of the parties."*

This question must be answered in the affirmative. The foregoing findings find substantial support in defendant's testimony that the real and personal property described in the complaint had been paid for by her with her own money, and that plaintiff had not made any payments on any of the property nor did he have any interest therein.

Defendant further testified that she and plaintiff never discussed or had any understanding relative to their entering into a partnership, joint enterprise or a joint ownership of the property described in the complaint. Such testimony constitutes substantial evidence to sustain the questioned findings.

[2] Second: *Was there substantial evidence to sustain the portion of the judgment of the trial court reading as follows:*

"That the defendant is the sole owner of all the real and personal property described in plaintiff's complaint herein and that plaintiff has no right, title or interest in and to any of said property."

This question must likewise be answered in the affirmative. The evidence heretofore set forth fully supports the provision in the judgment just quoted.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.

WEST KEY NUMBER SYSTEM

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77 Cal.App.2d 779

KINNEY v. SACRAMENTO CITY EMPLOYEES' RETIREMENT SYSTEM et al.

Civ. 7268.

District Court of Appeal, Third District, California.

Jan. 25, 1947.

1. Municipal corporations 🔑167

If a local administrative board bases its order solely on incompetent hearsay evidence, it acts arbitrarily, capriciously, and in abuse of its discretion and its order cannot stand.

2. Evidence 🔑318(4)

Report of doctor, who had not personally examined deceased, which purported to be a medical history of deceased's case and contained conclusions reached from writings therein of other physicians, was incompetent as hearsay.

3. Mandamus 🔑173

In mandamus proceeding to compel Sacramento Employees' Retirement Board to pay a disability pension to estate of petitioner's deceased husband who had been a Sacramento fireman, trial court was not required to receive new evidence where it did not appear that such evidence in exercise of reasonable diligence could not have been introduced on the hearings before the retirement board.

4. Municipal corporations 🔑200

Evidence sustained finding that physical strain, overexertion, and stress undergone in deceased's work as fireman in behalf of city of Sacramento so aggravated and further injured a pre-existing heart affliction that deceased proximately and by reason thereof was forced to retire from employment by the city, so as to authorize recovery, by deceased's administrator for benefit of estate, of disability pension allowance provided by city charter for employees disabled by reason of bodily injury received in performance of employee's duty, from time of deceased's retirement to date of death from heart attack.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Mandamus proceeding by Mildred L. Kinney, as administratrix of the estate of Paul D. Kinney, deceased, against Sacramento City Employees' Retirement System, and George B. Welch and others, as members of the Sacramento Employees' Retirement Board, to compel the board and its members to pay disability pension allowance to which Paul D. Kinney, deceased, was entitled. From judgment ordering issuance of peremptory writ of mandate, the board appeals.

Judgment affirmed.

Richard J. Lawrence, City Atty., of Sacramento, for appellants.

George L. Popert, of Sacramento, for petitioner.

PEEK, Justice.

This is an appeal by respondent Retirement Board from a judgment in favor of petitioner in a mandamus proceeding to determine the right of her deceased husband, formerly a member of the fire department of the city of Sacramento, to a disability pension allowance from the time of his retirement to the date of his death from a heart attack.

The pertinent portions of the charter of said city establishing a retirement system with regard to the question herein presented, provide that any city employee, a member of said system, who "shall become disabled by reason of any bodily injury received in the performance of his duty" shall be entitled to a certain percentage of the average monthly salary paid him during the year prior to his retirement.

It appears that petitioner's intestate, Paul D. Kinney, had served as an engineer in the city fire department from 1932 to April 22, 1944, when upon the advice of physicians that it would be unwise for him to continue in his work on account of heart trouble, he retired from the service.

On August 25, 1944, he filed an application with the respondent board for a retirement allowance based on disability received in the performance of his duty. On October 25, 1944 and February 14, 1945, hearings were held before the Retirement Board as provided in said charter, both the applicant and the Board being represented by counsel. The evidence on behalf of the applicant, in addition to his own testimony, consisted principally of the testimony of three fellow members of the fire department that on three occasions when applicant was called upon to exert unusual physical effort in the course of his duties he appeared to be more or less overcome thereby, and the written reports of four physicians (admitted without objection) who had personally examined applicant expressing the opinion that he was suffering from heart trouble either caused or aggravated by the performance of the duties of his employment. Two physicians were called for the Board. One, Dr. Murphy, who admittedly was not a "heart man", testified that he advised applicant to consult a heart specialist, the other, Dr. Giere, testified that undoubtedly the regular duties of Kinney, as well as the special ones which called for greater physical exertion, had a definite tendency to aggravate the chronic heart disease from which he was suffering. This testimony corroborated in part at least the written report of this witness, which was one of the above mentioned reports introduced on behalf of the applicant.

In addition the respondent Board admitted in evidence, over the repeated objections of counsel for applicant, a report of Dr. Reitzel, entitled "Memorandum of facts and proposed investigation concerning the occupational pension application of Paul D. Kinney." This report was a purported history of the applicant's case, based on writings that apparently had been submitted to the author thereof for his opinion. Included therein was a letter from the office of Naval Procurement summarizing the reasons for the physical disqualification of the applicant for service in the Naval Reserve, a report of the examining doctor at the Veterans' home Hospital, reports by five physicians, one of whom was the city physician, Dr. Cress, who had examined the applicant but whose purported letter was not authenticated or otherwise introduced at the hearings, and the conclusions reached by Dr. Reitzel from a study of these writings. The doctor had not personally examined the applicant. The reports of the other physicians were the same as those introduced in evidence by applicant.

After finding that Kinney had been employed by the city and had become totally disabled to continue the performance of his duties, the Board concluded "that said disability was not caused nor precipitated by any act of the employment * * *," and that the injury upon which his complaint was founded did not arise out of or occur in the "course of his employment", and, predicating its action upon such findings, denied his application.

Thereafter on April 9, 1945, the applicant died, and on May 10, 1945, his administratrix, petitioner herein, filed in the Superior Court of Sacramento County her petition for a writ of mandate to compel the respondent Board and the members thereof to pay to the estate the amount of the retirement allowance to which she alleged the deceased was entitled at the time of his retirement. The alternative writ issued and a trial was had. During the trial the entire transcript of the proceedings before the Board was received in evidence, and, upon petitioner's motion, that portion of the transcript which included the report of Dr. Reitzel entitled "Memorandum of facts and proposed investigation concerning the occupational pension application of Paul D. Kinney" was stricken on the ground that it was incompetent hearsay. After submission of the case the trial court made its findings of fact and conclusions of law in favor of the petitioner herein and against the appellant Board, and ordered that a peremptory writ of mandate be issued requiring said Board and the members thereof to grant and pay to petitioner a disability allowance in the amount provided by the charter. Appellants' motion to set aside the decision and grant a new trial was denied.

Among other things the court found that "all of the evidence showed, and such was the fact, that although said Paul D. Kinney had a pre-existing heart affliction, the physical strain, over-exertion and stress undergone by said Paul D. Kinney in his work as a fireman in behalf of the City of Sacramento, particularly during the years 1942, 1943 and 1944, so aggravated and further injured said heart condition, that proximately and by reason thereof he was forced to retire from his employment with said City of Sacramento as a fireman." It is from the judgment which was entered accordingly, ordering the issuance of the peremptory writ, that appellants have appealed.

[1] The rule seems to be clear that, if a local administrative board bases its order solely on incompetent hearsay evidence, it acts arbitrarily, capriciously and in abuse of its discretion, and its order cannot stand. Walker v. City of San Gabriel, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383. See also, La Prade v. Department of Water & Power, 27 Cal.2d 47, 52, 162 P.2d 13.

[2, 3] The evidence stricken was obviously incompetent hearsay. Appellants' offer of proof that "the testimony of Dr. Raymond J. Reitzel be offered in this matter," which the trial court rejected, could in no way relieve such documentary evidence of its intrinsic infirmity. Moreover, according to the very authority cited by appellants (Dare v. Board of Medical Examiners, 21 Cal.2d 790, 799, 136 P.2d 304), a trial court on mandamus is not required to receive new evidence unless it appears that "in the exercise of reasonable diligence, it could not have been introduced before the board." No such showing was made in this case.

[4] Since, as far as the record discloses, there was no competent evidence before the Board outside of said report to refute the uniform proof that applicant's disability was due to the performance of his duty (see Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 175 P.2d 823) within the meaning of the charter, there was a clear abuse of discretion on the part of the Board in refusing petitioner's application, and the superior court correctly, as a matter of law upon the undisputed evidence, granted the writ of mandate prayed for by her. Dillard v. City of Los Angeles, 20 Cal.2d 599, 606, 127 P.2d 917, 128 P.2d 537; Buckley v. Roche, 214 Cal. 241, 247, 4 P.2d 929.

The remaining contention which appellants urge concerns the character of the relief granted by the superior court. It is argued that the error which the court found to have been committed by the Board in admitting improper evidence did not warrant the judgment entered by said court, and that by striking certain evidence from the record before the Board and entering a judgment commanding the Board to take particularly specified action, the court improperly limited and controlled the discretion legally invested in the Board.

With such contention we cannot agree nor do we find support therefor in the authorities cited by appellants. Here, as in the case of Dillard v. City of Los Angeles, supra, 20 Cal.2d at page 606, 127 P.2d at page 921, "there was a clear abuse of discretion on the part of the pension board in refusing petitioner's application * * *, and the superior court should as a matter of law, upon the undisputed evidence, have granted the writ of mandate prayed for by her."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 805

In re McDONNELL'S ADOPTION.
McDONNELL v. HOLT et al. (two cases).

In re McDONNELL'S GUARDIANSHIP.
Civ. 3529, 3530.

District Court of Appeal, Fourth District, California.
Jan. 27, 1947.
Rehearing Denied Feb. 21, 1947.
Hearing Denied March 27, 1947.

1. Evidence 🔑161(1)

Evidence as to contents of written instrument signed by parents of baby in presence of an employee of the department of social welfare, which instrument was not produced and for which failure no excuse was offered was incompetent as an attempt to prove contents of a written instrument by parol.

2. Evidence 🔑48

District Court of Appeal can take judicial notice of official files of a state department.

3. Adoption 🔑13

Where particular document in the nature of a consent to adoption was in the official files of the department of social welfare, in proceedings on petition for adoption and objection thereto, court should have been informed of contents of document by certified copies in the record, notwithstanding that it could take judicial notice thereof.

4. Adoption 🔑1

The adoption of children was unknown to the common law and found its origin in the civil law and is now a part of the statutory laws of the state. Civ.Code, § 221 et seq.

5. Adoption 🔑1

To effect a legal adoption, the adoption statutes must be exactly followed.

6. Adoption 🔑7

Where no pleading was filed by or on behalf of father of legitimate child sought to be adopted, pleading of mother, in opposing petition for adoption, admitting the signing of consent to adoption, was not binding upon father and, in the absence of document itself showing signature of father, such pleading did not establish compliance with the statutory requirement of signature by both parents of a legitimate child to consent to adoption. Civ.Code, §§ 221, 224, 226.

7. Adoption 🔑7

Under the California adoption statute, the natural parents have right to withdraw consent to adoption at any time before rendition of decree of adoption. Civ.Code, § 221 et seq.

8. Adoption 🔑7

Department of social welfare has discretion to approve or disapprove a contemplated adoption and no decree of adoption may be made without approval or consent of department or, after appeal from its adverse action, only after parents have consented to adoption in open court if no consent by them has been filed with clerk of court. Civ.Code, § 221 et seq.

9. Adoption 🔑7

Where consent to adoption of a legitimate child by natural parents had been withdrawn and consent had not been filed with clerk of court and no consent was signed by them in open court, decree of adoption subsequently entered was erroneous for want of consent as a necessary prerequisite. Civ.Code, § 221 et seq.

10. Adoption 🔑7

The moral, social, and financial standing of petitioners in adoption proceeding becomes immaterial when natural parents of legitimate child withdraw their consent to adoption prior to the entry of decree and petition must be denied.

11. Guardian and ward 🔑13(1)

Where a petition for adoption has been filed and there is no allegation that minor involved was possessed of any estate and minor will have natural guardians either in the persons of his natural or his adoptive parents, petition for appointment of a guardian of person of minor should have been denied for want of necessity or convenience. Probate Code, §§ 1405, 1440.

12. Guardian and ward 🔑8

Order directing that notice of time and place of hearing on petition for appointment of guardian of a minor be given to minor's father, who lived in a foreign country, by service upon a designated attorney, who was a stranger to father, five days before hearing, did not give court jurisdiction over father for want of sufficient notice to father and for failure to allow a reasonable time before hearing. Probate Code, § 1441.

Appeals from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the adoption of Baby Boy McDonnell, a minor, and proceeding in the matter of the guardianship of Baby Boy McDonnell, also known as John LeRoy Holt, a minor, by John William Holt and Edith Wilma Holt, opposed by Lorraine Angeline Peters McDonnell, the mother of the child, who filed a petition for writ of habeas corpus to secure the custody of the child. From a decree of adoption by the petitioners and from an order appointing petitioners guardians of the person and estate of the child, objector appeals.

Decree and order reversed.

Siemon, Maas & Siemon, of Bakersfield, for appellant.

Dorris, Fleharty & Phillips, of Bakersfield, for respondents.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., amici curiae for appellant.

MARKS, Justice.

Two appeals are presented in this case. One is from a decree of adoption of Baby Boy McDonnell by John William Holt and Edith Wilma Holt. The other is from an order appointing Mr. and Mrs. Holt guardians of the person and estate of Baby Boy McDonnell, a minor.

It should be noted that the petition for the appointment of guardians did not allege that the minor was possessed of any estate. It only sought the appointment of guardians of his person. Further, the petition was filed on August 25, 1945, and the hearing was set for the following September 4th. The order setting the matter for hearing contained the following: "That notice be given to James Joseph Anthony McDonnell, Tierra Honda a Puente 61, Caracas, Venezuela, and to Lorraine Angeline McDonnell, address unknown, c/o T. H. Werdel, Haberfelde Bldg., Bakersfield, California, at least 5 days before said hearing." Mrs. McDonnell appeared and contested the petition. There is nothing in the record indicating that Mr. McDonnell or T. H. Werdel were ever served with any notice of the hearing. Mr. McDonnell was not present at the hearing, did not appear and was not represented by counsel.

Mr. Werdel was the attorney at law who represented Mrs. McDonnell in the earlier stages of the proceedings involved here, but was not the attorney for Mr. McDonnell. It appears from an uncontradicted affidavit of Mr. Werdel that Mr. McDonnell was very antagonistic to him and his associates. This antagonism resulted in Mrs. McDonnell dispensing with the services of these attorneys on September 4, 1945, before any of the matters involved here had come to trial.

There were three matters heard together at the trial commencing on December 17, 1945. Besides the petition for adoption and the petition for the appointment of guardians, there was a petition for a writ of habeas corpus brought by Mrs. Mc-

Donnell to regain the custody of Baby Boy McDonnell.

At the commencement of the trial it seemed to be the understanding of the court and counsel that while the petition for adoption should be considered primarily, all three matters would be heard together and all material evidence considered in the three cases. This resulted in some confusion during the trial. Some evidence admissible in one matter was clearly inadmissible in another. The trial judge overruled practically all of the objections and denied practically all motions to strike evidence made by counsel for Mrs. McDonnell. Much secondary hearsay and incompetent evidence is found in the record. From the view we take of the cases we need not pursue these matters further although counsel devote space to them in their briefs.

We will first consider the appeal from the order of adoption.

Baby Boy McDonnell was born in Bakersfield on May 10, 1945. He was the legitimate son of Mr. and Mrs. McDonnell. Mr. McDonnell announced, both before and after the birth of the baby, that they did not want the baby as it would interfere with his employment in a foreign country and with necessary travel; that the baby would never be taken from the maternity home by them; that it should be put out for adoption. Mrs. McDonnell concurred in these statements.

Mrs. McDonnell returned from the maternity home to the couple's residence in Taft about a week after the birth of the boy where she and her husband remained for a short time before leaving for San Francisco. Mrs. McDonnell remained there for a time, living with her mother-in-law, and Mr. McDonnell left for his employment in Venezuela.

[1] The petition for adoption was filed by Mr. and Mrs. Holt on May 11, 1945, when Baby Boy was one day old. Some kind of a document was signed by Mr. and Mrs. McDonnell in the presence of a Mrs. Schultz, an employee of the Department of Social Welfare, about May 28, 1945. This instrument is not before us and the description of it is most vague and unsatisfactory. We cannot determine its exact nature from anything in the record. No reasonable excuse was given by counsel for Mr. and Mrs. Holt for their failure to produce the instrument or a certified copy of it which they claim and the evidence suggests was a consent to the adoption. Of course the evidence as to what the instrument contained was an attempt to prove the contents of a written instrument by parol.

[2, 3] The attorney general has filed a brief as amicus curiæ on behalf of appellant at the request of the State Department of Social Welfare. Attached to this brief is a blank consent to adoption in the form prescribed by the Department of Social Welfare which contained the following: "In signing this consent I understand that it does not become final until it has been accepted by the State Department of Social Welfare after ascertaining that the best interests of the child will be promoted by the proposed adoption." He states that this form was signed by Mr. and Mrs. McDonnell and that it consented to the adoption of their son by Mr. and Mrs. Holt. He also states that the word "Void" in vivid red ink was written across the face of this consent and that it is in the files of the Department of Social Welfare. For the purpose of this opinion we will assume these facts to be true as we can take judicial notice of the official files of a State Department, though in this case there seems to be no good reason why we should not have been informed of the contents by certified copies in the record.

The Attorney General also points out that the Department of Social Welfare has prepared and published a manual of adoption policies and procedures from which, among other things, he quotes the following: "The natural mother of an illegitimate child and either natural parent or both of a legitimate child may withdraw their consent to the adoption of their child at any time before the actual issuance of the order of adoption by the court."

On August 23, 1945, the Department of Social Welfare filed its report recommending that the adoption of Baby Boy McDonnell by Mr. and Mrs. Holt "be denied without prejudice to the petitioners." Attached to this report is a copy of a letter dated August 11, 1945, written by Mrs. McDonnell to Mrs. Schultz. Mrs. McDonnell had evidently employed an investigator to locate Baby Boy and report to her on the conditions under which he was living. The letter reflects the state of mind of a worried mother who regretted the necessity of her former act and was greatly interested in and anxious about the welfare of her child.

Also attached to the report is a letter dated, Caracas, Venezuela, August 14, 1945, from Mr. McDonnell to Mrs. Schultz from which we quote the following:

"This letter is in reference to the transaction that was begun on May 27th, 1945, in Bakersfield, California, in your car.

"This is to advise you that our personal affairs at that time were in a complete state of saturation, with coming to South American and all that it entailed, and after due consideration on the part of both of us we felt the deal with you would solve the problem.

"Now that things have taken one of those complete reverses and instead of living in the primitive state we are nicely settled here in Caracas, lovely home, servants and all to go with it. We have found out that the tranaction with you was one of those horrible errors of judgment, people make once in a lifetime and sometimes pay the rest of their natural lives for."

The Department of Social Welfare also filed supplemental reports dated August 27, October 17, 1945, and a further report dated November 23, 1945. These transmitted a telegram, letters, and two formal refusals to give consent to the adoption, each signed by one or the other parent of the boy. The Department of Social Welfare did not change its original position that the petition for adoption should be denied.

[4, 5] The adoption of children was unknown to the common law and found its origin in the civil law from which source it has found its way into the statutes of this State. To effect a legal adoption these statutes must be exactly followed. Consent of both parents of a legitimate child is made a prime requisite in our adoption statutes, found in Section 221 et seq., of the Civil Code. In re Cozza, 163 Cal. 514, 126 P. 161, Ann.Cas.1914A, 214; Estate of Sharon, 179 Cal. 447, 177 P. 283; In re McGrew, 183 Cal. 177, 190 P. 804.

Section 224 of the Civil Code provides that "a legitimate child cannot be adopted without the consent of its parents if living," subject to exceptions not important here.

Section 226 of the same Code specifies the procedure in adoption cases. It is provided that in all cases where consent is necessary, of which this is one, the natural parents must sign a consent to the adoption in the presence of an agent of the Department of Social Welfare on a form prescribed by it, which consent must be filed with the clerk of the Superior Court in the county of the residence of petitioners; that the Department of Social Welfare must, within 180 days, or such longer time as may be allowed by the court, make a full report to the court of the facts disclosed by its inquiry, together with "a recommendation regarding the granting of the petition" for adoption. The last paragraph of the section provides for an appeal to the court by either the petitioners or the parents from a failure or refusal of the Department of Social Welfare to accept the consent of the parents or to consent to the adoption. The Department of Social Welfare within ten days is required to file a report of its findings and the reasons for its failure or refusal to consent to the adoption or to accept the consent of the natural parents; that "if for a period of 180 days from the date of filing the petition, or upon the expiration of any extension of said period granted by the court, the Department of Social Welfare fails or refuses to accept the consent of the natural parent or parents to the adoption, or if said department fails or refuses to file or to give its consent to an adoption in those cases where its consent is required by this chapter, either the natural parent or parents or the petitioner may appeal from such failure or refusal to the superior court of the county in which the petition is filed, in which event the clerk shall immediately notify the Department of Social Welfare of such appeal and the department shall within 10 days file a report of its findings and the reasons for its failure or refusal to consent to the adoption or to accept the consent of the natural parent. After the filing of said findings, the court may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent by the natural parent or parents in open court, or if the appeal be from the refusal of said department to consent thereto, grant the petition without such consent." If such an appeal was taken in this case, no consent was signed by the parents in open court or otherwise other than the one we have assumed was signed on May 28, 1945.

[6] In this connection it is argued by counsel for petitioners that the pleadings admit that a consent was signed by the parents on May 28, 1945, so no further proof on that question was necessary and, further, that Mrs. McDonnell testified that she and her husband signed such consent before Mrs. Schultz on that date. It may be that the answer of Mrs. McDonnell admits the signing of the consent but there was no pleading filed by or on behalf of her husband so her admissions cannot bind him. Both parents, if living, must sign the consent.

Mrs. McDonnell did testify that she and her husband signed some paper having to do with the adoption before Mrs. Schultz on or about May 28, 1945. She was very indefinite about the contents of the instrument and did not know its terms.

The copy of the consent produced by the attorney general specifically provides that "it does not become final until it has been accepted by the State Department of Social Welfare," which makes the consent conditional and not final. Further, the rules promulgated by the Department of Social Welfare specifically provide for the withdrawal of consent by either or both natural parents of a legitimate child at any time before the issuance of the actual order of adoption by the court hearing the proceeding.

We have been cited to no California case dealing with the right of natural parents of a legitimate child to withdraw the consent to adoption before a decree of adoption has been rendered, such consent having once been given. The question seems to be one of first impression here. The courts of sister states are not in accord on it.

The right of adoption being strictly statutory, the weight to be given here to the decisions in other jurisdictions depends not so much on the logic to be found in the decisions as upon the particular statutory provisions being construed. For this and other reasons we will not consider in detail the various cases relied upon by counsel. We will merely cite them.

Counsel for the parents and the attorney general cite the following: In re Nelms, 153 Wash. 242, 279 P. 748; French v. Catholic Community League, 69 Ohio App. 442, 44 N.E.2d 113; In re White's Adoption, 300 Mich. 378, 1 N.W.2d 579, 138 A.L.R. 1034; In re Anonymous, 178 Misc. 142, 33 N.Y.S.2d 793; 2 C.J.S., Adoption of Children, § 21, p. 386.

Counsel for Mr. and Mrs. Holt cite the following: Lane v. Pippin, 110 W.Va. 357, 158 S.E. 673; Wyness v. Crowley, 292 Mass. 459, 198 N.E. 758; Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457; In re Adoption of a Minor, 79 U.S.App.D.C. 191, 144 F.2d 644, 156 A.L.R. 1001; Annotations, 156 A.L.R. 1001, and 138 A.L.R. 1034.

[7-9] We think it must be concluded from the adoption statutes of this State that natural parents have the right to withdraw a consent to adoption at any time before the rendition of the decree of adoption. The statute delegates to the Department of Social Welfare the power to prepare the form of the consent and that form as adopted shows that the consent is conditional and not absolute. This is further fortified by the rules promulgated by that department. The Department of Social Welfare is given a period of not less than 180 days in which to investigate and report on a case. It clearly appears that a discretion is vested in that department to either approve or disapprove the adoption and it is indicated that no decree of adoption should be made without the approval or consent of that department or after appeal from its adverse action and then only after the parents had consented to

the adoption in open court if no consent by them had been filed with the clerk of the court. As the consent of the parents had been withdrawn and had not been filed with the clerk of the court, and as no consent was signed by them in open court, and as a consent by both parents is a necessary prerequisite to any decree of adoption, the decree in question here cannot stand.

[10] The petitioners are persons of unquestioned moral and social standing and financially able to give Baby Boy the advantages of a very good home with all the necessaries and some of the luxuries of life. We might well conclude this phase of the case with the following quotation from In re Anonymous, supra [178 Misc. 142, 33 N.Y.S.2d 798]:

> "In Matter of Bistany, supra, 239 N.Y. [19,] at page 24, 145 N.E. [70,] at page 72, the late Justice Cardoza disposed of similar arguments as follows: 'Stress has been laid in argument upon the welfare of the child, her prosperity and happiness. We do not dwell upon such considerations, for they are foreign to the issue. We digress merely to state that nothing in this record gives color to a suspicion that the parents are actuated by any sinister design. If the proceeding were habeas corpus, to determine custody alone, there would be need to consider whether the welfare of the child might be held to be controlling. The petitioner asks for more than custody. They seek to make the child their own.'
>
> "It is conceivable, of course, that granting the adoption might promote the moral and temporal interests of this child. My investigation indicates that petitioners are persons of high standing in their community and have ample financial resources to extend to the child comforts and advantages which otherwise might be denied her. Unfortunately, however, the law does not permit me to give weight to such considerations. The rights of the natural parent are paramount."

We will now turn to a consideration of the guardianship proceeding. The evidence presents a sharp conflict which ordinarily might lead to an affirmance of the order. However, this is not the ordinary case in which a minor has or will have no fit natural guardian and his custody must be entrusted to some other person.

[11] The guardianship proceeding before us is so entwined in the record with the adoption that the one should not be decided without due regard to the other. If the petition for adoption is either granted or denied the necessity or convenience of the appointment of guardians of the person of the minor will disappear for he will then have natural guardians either in the persons of his natural or his adoptive parents. If Mr. and Mrs. Holt should be appointed guardians of the person of the minor and the petition for adoption should be denied the result could only be confusion and further litigation. Thus it is neither "necessary or convenient" to appoint guardians of the person of the minor in a proceeding heard prior to the adoption proceeding. A showing of necessity and convenience is necessary in guardianship proceedings. Secs. 1405 and 1440, Probate Code.

[12] Further, as we have already seen, the court never acquired jurisdiction over Mr. McDonnell as no notice of the time and place of the hearing as required by section 1441 of the Probate Code and the order of court was ever served on him. That Code Section contains the following: "In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reasons, such notice cannot be given." The validity of the court order providing for service on Mr. McDonnell is open to serious question. Service of notice on an attorney who was a total stranger to the person to be notified cannot be held to be notice to the father of the child. Also, under the facts appearing here, where the person to be notified lives in a foreign country far distant from the city in which the hearing was to be held, service on him only five days before the day set for hearing, if service had been made, cannot be regarded as reasonable.

The decree of adoption, and the order appointing the guardians, are both reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

77 Cal.App.2d 842

VAN CORE v. BODNER.

Civ. 3451.

District Court of Appeal, Fourth District, California.

Jan. 29, 1947.

1. Frauds, statute of 🔑75, 138(4)

An oral agreement to leave realty by deed, in compensation for services rendered or to be rendered, is unenforceable as such, but the remedy is one in quantum meruit for value of services rendered. Civ.Code, § 1624; Code Civ.Proc. § 1973.

2. Specific performance 🔑105(1)

If grantee of deed that had been deposited with third person with instructions to deliver it after deaths of both grantors in consideration for various services rendered grantors by grantee could seek specific performance of alleged agreement of grantors to convey realty to him for services rendered them, he could not seek it until after the deaths of both grantors. Civ. Code, §§ 3386, 3388.

3. Deeds 🔑66, 200

The question as to the intention of a grantor in delivering a deed to a third party is one of fact, unless instructions are entirely in writing, when it becomes a question of law, but when written instruments do not purport to be all of the directions given, or admit of more than one interpretation, evidence of circumstances attending preparation of deed and acts and statements of alleged grantor, material to question of delivery, during entire period of escrow, is admissible.

4. Deeds 🔑200

Where grantors delivered deed to third party with a letter stating that he was to hold the deed until after deaths of both grantors and then deliver it to grantee in consideration for services rendered grantors by grantee "during our lifetime," letter was equivocal, and court should have taken evidence on question and directly found on issue whether grantors, when they signed deed, intended to part with their title in realty as of that date, which would in effect reserve in them a life estate, or whether they intended that title and ownership was to remain vested in them and pass to grantee after their death.

5. Deeds 🔑9

If it be intention of grantor, when he deposits a deed, that it shall only be delivered to grantee by depositary after grantor's death and that title is to vest only on such delivery after his death, then deed is inoperative as constituting an attempt by grantor to make a testamentary disposition of his property.

◆

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Action to quiet title by William Van Core against Andrew J. Bodner, also known as Andy Bodner, wherein defendant filed a cross-complaint, claiming an interest in the realty and seeking recovery for funds allegedly advanced by him to the plaintiff. From a judgment holding that plaintiff was the owner of the realty subject to provisions in letter that title to realty should pass and vest in defendant on delivery to defendant of deed executed by plaintiff and his wife, on plaintiff's death, the plaintiff appeals.

Judgment reversed.

Waldo Willhoft, of San Bernardino, for appellant.

R. Bruce Findlay, of San Bernardino, for respondent.

GRIFFIN, Justice.

Plaintiff brought this simple action to quiet title against defendant. Defendant answered, and by way of cross-complaint set forth his claimed interest in the property and also sought the recovery of $700 for funds claimed to have been advanced by him to plaintiff.

Plaintiff William Van Core, aged 68, and his wife, Margaret R. Van Core, aged 63 in October, 1931, acquired a 2½ acre tract of land in Fontana on that date. It was held in joint tenancy and was improved with a small dwelling, chicken equipment, and a few fruit trees. Within a year from the date of purchase, defendant Andrew J. Bodner, hereinafter referred to as "Andy", aged 29, came to live with them. He was not well. He suffered some illness in one leg which required him to walk on crutches, and he had a spinal injury causing him to wear a brace. He could do only light work. The Van Cores had no money or income and lived on relief. Andy had no income but did have an old Ford automobile and drove it about. He visited the Van Core home occasionally.

He testified that "they told me to move in and occupy that spare bedroom * * * it would save me wear and tear of the car (going home)." Van Cores provided him with oil and gas and upkeep. He further testified that "It was a sort of a pooling arrangement to keep * * * living expenses down"; that the Van Cores were expecting to receive some legacy through a New York estate—"The Descending Freeholders of the Blood, the Members of the Corporation of the Town of New Harlem", and that Mrs. Van Core's bible class were financing the cost of the genealogy. Based upon the vision of a large inheritance, the Van Cores, in May, 1932, planned to travel extensively by automobile and had agreed to employ defendant at a regular chauffeur's salary to drive them about. This vision never materialized. Thereafter, it is claimed by defendant that Mrs. Van Core (who had been ill over a period of years and had considerable care given her by defendant), stated that "as long as this money is not going to materialize and I don't know how long I am going to live, we decided to sign this property over to you as long as we are not able to pay you otherwise"; that this was to be for his services "provided I would stay on and help them right on through", and provided also that I "continued to live". Mr. Van Core was not present at that conversation. He then testified that Mrs. Van Core did not say how they intended to turn the property over, whether by deed or will; that she said: "We want you to have this home after we are gone."

On January 22, 1940, Mrs. Van Core went to an attorney's office and instructed the attorney to draw a grant deed to the premises in favor of defendant. The pleadings set forth the grant deed as prepared, which was dated January 22, 1940, and was signed by both Mr. and Mrs. Van Core. It was deposited with a Mr. Skinner and was accompanied by a letter, signed by both grantors, reciting that "We hand you, herewith, grant deed executed by ourselves in favor of Andrew J. Bodner, dated this day, covering the property which we now own, situated on Colton Avenue, west of Bloomington, Calif. You are to hold this deed until after the death of both of us, after which event, you are to deliver the deed to Mr. Bodner, in consideration of various domestic and other types of services and conveniences which he has done for us during our lifetime."

Bodner had no knowledge of the execution of the deed or the letter accompanying it until a short time before this action was commenced. He continued to live at the Van Core home and care for Mrs. Van Core. He and Mr. Van Core did not get along very well. They had several physical and verbal altercations. On January 3, 1944, Mrs. Van Core died. Disagreements between Mr. Van Core and Andy continued. Each tried to lock the other out of the house. At the time of trial each was living in the house but they were not speaking to each other and each claimed title to the property. At the trial, Mr. Van Core claimed that he was unable to read and write. He testified that he did not remember signing any deed or letter purporting to deed the property to Andy in the event of his and his wife's death; that his wife dominated him in all business affairs; that nothing was ever said between them about deeding the property to Andy; and that his wife suggested at one time that they adopt Andy but he remarked "Nothing doing".

The attorney for Mrs. Van Core, who drew the grant deed, testified that Mr. Van Core was not with her in his office, although Mr. Van Core testified that he was; that Mrs. Van Core came to his office for the first time and stated that she wanted a deed prepared which was to be signed by her and her husband in favor of Andy and which deed was to be left with a third party to be delivered to him in the event of their death; that he told her that was not a safe practice and suggested making a will or creating a life estate for each in the property; that Mrs. Van Core objected to that and said: "We don't want Andy to have any interest in the property until we are dead"; that he then prepared the deed and letter and went to the Van Core home where Mr. and Mrs. Van Core signed them; that Andy was present, in the background; that he asked Mr. Van Core if he understood what it was all about and that before he could answer the question Mrs. Van Core stated: "Don't pay any attention to him, he doesn't know anything. * * * Don't discuss this with him; I take care of our business"; that he notarized the papers and left them with Mrs. Van Core; that Andy later came to him about the transaction and that he referred him to Mr. Skinner and that it was then that Andy learned, for the first time, that Mr. Skinner held a grant deed and letter from the Van Cores pertaining to the disposition of the property; that Mr. Van Core also came to him and wanted the grant deed repudiated and canceled and also wanted to have the letter withdrawn; that such a notice of repudiation and rescission was served on Mr. Skinner and Andy. A decree was entered in court terminating the joint tenancy in favor of Mr. Van Core.

Plaintiff then commenced this action to quiet his title against defendant. Upon this evidence the trial court found generally that the grant deed was duly executed on January 22, 1940, for a valuable consideration, to wit "services theretofore rendered to and for" Mr. and Mrs. Van Core by the defendant; that said deed was made in accordance with "an agreement theretofore had between plaintiff and his said wife on the one hand and the defendant upon the other"; that Mrs. Van Core died on January 3, 1944, and that thereupon the said joint tenancy theretofore existing between plaintiff and his wife "terminated and that since said date the plaintiff has held and does now hold the title to said real property, subject to the provisions of the said grant deed theretofore executed to the defendant and subject to the provisions of said letter to Samuel R. Skinner * * *; that cross-complainant has continued to occupy said real property jointly with plaintiff"; and that as to cross-complainant's claim for the recovery of $700, it is found "that there is no evidence before this court by which it can be determined what are the proportionate amounts of said account to which the plaintiff and the defendant are entitled"; and concluded that "plaintiff is the owner of all of the property described in the complaint, *subject to the provision that the title thereto shall pass and vest in defendant upon the delivery to the defendant of the grant deed above mentioned upon the death of plaintiff* * * *; that the plaintiff is entitled to the present possession of all of said real property", and rendered judgment accordingly. Plaintiff appeals from the portion of the judgment italicized.

It is argued (1) that the grant deed and letter were of testamentary character and intent and therefore of no legal effect; (2) that the finding of the court that there was an agreement to deed the property, for *services rendered*, is contrary to the evidence; (3) that plaintiff had a legal right to revoke the deed deposited with a third person, and having exercised that right, the defendant was relegated to an action for damages, if he sustained any, by the act of revocation; (4) that the agreement relied on by the defendant is not one which in law may be specifically enforced against the plaintiff.

[1] An agreement to leave property by deed is invalid unless in writing (Sec. 1624, Civ.Code; Sec. 1973, C.C.P.). An oral agreement to leave property by deed, in compensation for services rendered, or to be rendered, is not enforceable, as such, but the remedy is one in quantum meruit for the value of the services rendered. De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522. See, also, Zaring v. Brown, 41 Cal.App.2d 227, 106 P.2d 224.

Defendant testified that so far as he knew, there was no written agreement between the Van Cores and himself that the property was to be deeded to him for the services performed or to be performed. The only writing was the deed and the letter accompanying it. These writings were not signed by defendant. The most that can be said from his testimony is that there was an oral agreement on the part of Mr. and Mrs. Van Core that they would see that the property was left to him, after their death, in consideration of defendant's oral agreement to render them personal service during their lifetime. Apparently, in contemplation of this oral agreement, Mr. and Mrs. Van Core placed a grant deed in the hands of a trustee, to be delivered to defendant, upon the fulfillment of his oral agreement to render his personal service to them. The trial court has found these suggested facts to be true under one of its several findings which we will set forth and further discuss.

The main testimony in respect to the nature of the services to be performed and whether the property was to be given to him in consideration of his services to be performed or whether he had already performed them at the time of the signing of the grant deed and letter, comes from the lips of defendant. He testified, time and again, without any equivocation, that they were to sign the "property over" to him "provided I would stay on and help them right on through" and provided "I continued to live. * * * In other words, the signing over of the property was contingent on * * * me surviving them. * * * So far as I knew, there was never any intent to give me any interest in the property until they both died * * *"; that he had a verbal agreement with Mrs. Van Core that if he would continue to do "this domestic work" that she would "leave me the property on her death"; that Mr. Van Core was not present then, but he believed he knew "about all the facts because they talked it over among themselves".

In addition to his testimony he specifically alleges in his verified cross-complaint that in consideration for the agreement to transfer the property in question he "was to live with them and do certain housework, nursing and general utility work around their home and ranch *until such time as they, the said William Van Core and Margaret R. Van Core, should have passed away*" (Italics ours); that the agreement is still in full force and effect and that he "offers * * * complete performance of the same".

The trial court specifically found that these allegations were true. The evidence we have noticed supporting the incongruous and repugnant finding that the Van Cores "for a valuable consideration, to wit * * * services *theretofore* rendered to" them executed the grant deed, is the grant deed and the letter prepared by their attorney, which letter recites that the consideration was the "various domestic * * * services * * * which he *has done* for us during our lifetime". (Italics ours.) The uncontradicted testimony of the *defendant* supports only the finding that the consideration for the deed was domestic work he had done and was yet obligated to do during the lifetime of both Mr. and Mrs. Van Core.

The trial court likewise found that Mr. Van Core repudiated the agreement and prevented Bodner from carrying it out, and that Bodner performed all services incumbent upon him to be done and that he stands ready, able and willing to carry out the same until the completion thereof.

[2] The pleadings do not seek specific performance of the claimed agreement. If defendant could seek specific performance at all, he could not, under the claimed agreement, seek it until the death of Mr. Van Core. Secs. 3386 and 3388, Civil Code; Cooper v. Pena, 21 Cal. 403; Moore v. Tuohy, 142 Cal. 342, 75 P. 896; Wakeham v. Barker, 82 Cal. 46, 22 P. 1131; Hayden v. Collins, 1 Cal.App. 259, 265, 81 P. 1120; Roy v. Pos, 183 Cal. 359, 366, 191 P. 542.

If the defendant is seeking to claim title to the property under the grant deed and letter in evidence, it must be predicated upon the theory that the grantors intended, at the time of the making of the grant deed, to part with their present title to and ownership in the property but delivery of the deed to be postponed until after their death, which in effect would be the granting of title to defendant reserving a life estate for themselves. The question then presented is whether or not the evidence would support this conclusion and whether or not the trial court has directly found on that question.

[3] There is a rule of law that the question as to the intention of a grantor in delivering a deed to a third party is one of fact, unless the instructions are entirely in writing, when it becomes one of law; but when the written instruments do not purport to be all of the directions given, or the same are equivocal, i. e., having two or more significations, ambiguous, uncertain, or doubtful, or which admit of more than one interpretation, evidence of the circumstances attending the preparation of the deed and the acts and statements of the alleged grantor material to the question of delivery, during the entire period of escrow, is admissible. Manwell v. Board of Home Missions, etc., 122 Cal.App. 599, 10 P.2d 787; 5 Cal.Jur. [Ten Year Supp.] 1944 Rev. p. 171, § 78.

Upon a casual reading of the letter accompanying the grant deed it might be so interpreted that the deed was to be delivered to defendant in consideration of services which he had already performed, and under such circumstances it might be concluded that the general rule applies that where there is evidence that a grantor delivered his deed to a third person with instructions to deliver it to the grantee after the grantor's death, without any other evidence of intention, it is sufficient to justify the inference that the grantor thereby intended to part with all right thereafter to control the deed. It has been repeatedly held that whether such inference is overcome by other proof involves the question of weighing the evidence, which is a matter within the exclusive province of the trial court, on which question specific findings should have been made. Wilcox v. Hardisty, 60 Cal.App. 206, 212 P. 633.

[4, 5] Upon a second reading of the instrument, however, and after reading the verified pleadings of the parties and the evidence offered in connection therewith, another and different interpretation may be placed on the wording of the written instruments which would be in accordance with the pleadings and evidence, i. e., that defendant was to receive title to the property only after he had rendered personal service to the Van Cores during their lifetimes. The instrument recites that the deed is delivered to Mr. Skinner but that delivery shall be delayed until the Van Cores' deaths in consideration of domestic services "which he (Bodner) has done for us *during our lifetime*". (Italics ours.) It does not recite that it was for services that had theretofore been rendered to them up to the time of the signing of the deed, but for services done during their lifetime. Considering the fact that the written instrument is therefore equivocal and admits of more than one interpretation, the trial court should take evidence on this question and directly find on the issue, whether the Van Cores, at the time they signed the grant deed, intended to part with their title and ownership in and to the property, as of that date, which would in effect reserve in themselves a life estate, or whether they intended that title and ownership was to remain vested in the Van Cores and to pass to defendant Bodner, after their death. If it be the intention of the grantor, when he deposits a deed, that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that title *is to vest only upon such delivery after his death,* then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703. Without specific findings on these issues, a determination of the correctness of the judgment is impossible and the judgment should be reversed for this purpose.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.

78 Cal.App.2d 6

PEOPLE v. ENGELHART.

Cr. 2421.

District Court of Appeal, First District,
Division 2, California.

Feb. 6, 1947.

1. Criminal law 🔑1159(2)

Where an appeal is tendered on ground of insufficiency of the evidence to support the judgment or verdict, function of reviewing court is to determine whether there is substantial evidence, direct or indirect, to support it or whether, from facts proved, there is a reasonable deduction to be drawn, or a presumption of law which supplies lack of proved facts.

2. Criminal law 🔑745

Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for jury. Code Civ. Proc. § 1958.

3. Criminal law 🔑1159(2)

An Appellate Court will not attempt to determine the weight of the evidence, but will decide only whether, on the face of the evidence, it can be held that sufficient facts could have been found by the jury to warrant inference of guilt.

4. Criminal law 🔑1160

It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by evidence, and before the verdict of jury, which has been approved by the trial court, can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that on no hypothesis is there sufficient substantial evidence to support conclusion reached in trial court.

5. Insurance 🔑31

Evidence sustained conviction of one owning partnership interest in tavern, for violation of the insurance code by presenting a false claim for insurance on a quantity of liquor allegedly stolen from the tavern.

Appeal from Superior Court, San Francisco County; William F. Traverso, Judge.

Claude L. Engelhart was convicted of violating the insurance code by presenting a false claim for insurance on liquor allegedly stolen, and he appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

In a trial to a jury the defendant was convicted for a violation of the Insurance Code in presenting a false claim for insurance upon a quantity of liquor claimed to have been stolen. He appeals from the judgment and from the order denying his motion for a new trial.

The defendant with two partners owned and operated a tavern in San Francisco known as The Camel Club. On the evening of February 21, 1945, the two other partners left the club at about 11:30 p.m.; defendant was then attending the bar and was in full possession of the premises. He left at about 12:30 and went to the home of one of the partners. There they received a telephone call telling them that the club had been burglarized. A few days later defendant and one of the partners made out an inventory and proof of loss which defendant signed and delivered to the agent of the insurance company.

On March 12, 1945, defendant went to the home of his sister-in-law where he stayed through the night. The following morning three police officers went to these premises. The defendant, who had spent the night on a bed in the living room, opened the door for the officers. He was very drunk and could not recall the conversations he had with the officers. One of them asked: "Where is all this whiskey that is supposed to be here?" The defendant let the officers in and went back to bed. He could not recall what answer he gave to the question about the liquor. The officers searched the premises and found twenty-five full cases and one opened case of liquor admittedly taken from the Camel Club. Three empty bottles taken from the opened case were found in the kitchen. Later fourteen more cases were found in the garage. After the liquor was found on March 13, the defendant was taken into custody. One of the partners was called to the premises; the defendant and other occupants were questioned, but all denied any knowledge of the presence of the liquor on the premises. While defendant was being transported to the police headquarters he said to his partner: "I wonder who fingered the place to the cops."

The only ground urged on the appeal is that the evidence is insufficient to support the verdict. It is conceded that there is no direct evidence that appellant was a party to the taking of the liquor, or to the storing of it in the premises of his sister-in-law, or of the knowledge that it was so stored when he filed the claim with the insurance company. It was not necessary for the State to prove more than that he filed a false claim of loss. To supply this proof the respondent relies upon the circumstantial evidence and the inference of knowledge arising from these circumstances. The question of law confronting us is whether, when guilty knowledge is an essential element of the crime charged, such knowledge may be inferred from the facts proved.

Appellant relies upon People v. Gory, 28 Cal.2d 450, 170 P.2d 433, and People v. Bledsoe, 75 Cal.App.2d 862, 171 P.2d 950, both of which were prosecutions for the unlawful possession of narcotics. Neither case is helpful here. Both emphasized the necessity of proof of knowledge "of the presence" of the drug as an essential element of the charge of unlawful possession. The Gory case went on the question of the necessity of an instruction covering that element of the crime. The Bledsoe case merely held that such proof was essential and that all the circumstances proved were insufficient to support a reasonable inference of knowledge. Both recognized as elementary that such knowledge need not be proved by direct evidence. There is nothing in the Bledsoe case which justifies the statement that it holds that the denials of the defendant must be taken as true as a matter of law. The plain language of the opinion is that no *reasonable* inference of knowledge could be drawn from the circumstances proved—and that is the basis of an inference as defined in section 1958 of the Code of Civil Procedure.

[1, 2] When an appeal is tendered on the ground of insufficiency of the evidence to support the judgment or verdict the function of the reviewing court is to determine whether there is substantial evidence direct or indirect to support it or whether, from the facts proved, there is a reasonable deduction to be drawn, or a presumption of law which supplies the lack of proved facts. If the question relates to inferences alone the principle is clearly stated in the concise sentence found in Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870: "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60."

In the case at hand we must hold that a reasonable inference could have been drawn that appellant had "knowledge of the presence" of the liquor in the home of his sister-in-law from the fact that he was the last known person in possession of the premises from which it was taken, that he was a frequent visitor at the home of his sister-in-law, that the liquor was found in a locked room of her home, that the key to the room could not be found, that three empty bottles carrying distinct identification marks of the stolen liquor were found in the kitchen, and that appellant was found on the premises by the police officers at 10 a. m. so completely intoxicated that he was described as drunk, "a pretty sick boy," with a "hangover," and so intoxicated that "it is possible" that he did not understand what the officer was asking him. It was a reasonable deduction from these facts that appellant had become intoxicated from drinking of the liquor from the empty bottles found in the kitchen. Since three bottles carried the stamp showing that they belonged to the Camel Club it was reasonable to infer that appellant knew he was using the liquor for which he had filed the claim of loss, and that he had known where to find it.

[3-5] Under these circumstances the case is controlled by the rule of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, reading: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below * * *.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.

29 Cal.2d 555

PEOPLE v. BROWN.

Cr. 4734.

Supreme Court of California, in Bank.
Jan. 22, 1947.

1. Kidnapping ⚿1

It is sufficient to constitute "kidnapping for purpose of extortion or robbery" if kidnapper commits extortion or robbery during the kidnapping, irrespective of original motive of kidnapping. Pen.Code, § 209.

See Words and Phrases, Permanent Edition, for all other definitions of "Kidnapping for Purpose of Extortion" and "Kidnapping for Purpose of Robbery".

2. Kidnapping ⚿5

Evidence justified conviction of kidnapping for purpose of robbery. Pen.Code, § 209.

3. Kidnapping ⚿6

In prosecution for kidnapping for purpose of robbery the fact that trial court designated crime when instructing jury on nature of penalties merely as kidnapping was not confusing, where jury was adequately informed of nature of crime with which defendant was charged. Pen.Code, § 209.

4. Kidnapping ⚿6

Any touching of victim against her will with physical force in intentional, hostile and aggravated manner or projecting of such force against victim by kidnapper is "bodily harm" within statute providing death penalty if person kidnapped suffered bodily harm. Pen.Code, § 209.

See Words and Phrases, Permanent Edition, for all other definitions of "Bodily Harm".

5. Kidnapping ⚿6

The fact that victim was raped by defendant and thereafter knocked to the ground by him with a vicious blow to her chin which remained bruised and discolored for several days constituted "bodily harm" within kidnapping statute providing death penalty if person kidnapped suffered bodily harm. Pen.Code, § 209.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Edward Wesley Brown was convicted of robbery in two counts, of rape, and of kidnapping for purpose of robbery, and a death sentence imposed, and automatic appeal was taken.

Affirmed.

Darold D. DeCoe and C. K. Curtright, both of Sacramento, for appellant.

Roberty W. Kenny and Fred N. Howser, Attys. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant, Edward Wesley Brown, was convicted of robbery in two counts, of rape, and of kidnaping for the purpose of robbery. The jury found that the victim suffered bodily harm and fixed the punishment of death. This is an automatic appeal under section 1239(b) of the Penal Code.

The facts disclosed by the record are as follows: On March 22, 1946, at about 9 p. m., Mrs. Cleda M. Jacobs returned to her automobile after visiting a doctor's office in the city of Sacramento. As soon as she was seated, a man, identified by her as defendant, entered the automobile and exhibited a gun, saying, "Madam, this is a gun, it is loaded. Do as you are told and no harm will come to you." Defendant ordered Mrs. Jacobs to drive her car according to his directions and they went an undetermined distance to a point outside the congested area of the city. During the entire ride defendant gave the orders and kept his gun pointed at Mrs. Jacobs. Finally, he ordered her to drive the car to the side of the road and get out. She started to take her purse with her, but was ordered to leave it in the car. Defendant then got out and, still pointing the gun at Mrs. Jacobs, directed her to go up a hill on a levee. When they reached some bushes defendant ordered Mrs. Jacobs to disrobe and lie down. Defendant then had sexual intercourse with her and kept the gun in his hand during the entire act. Defendant dried himself with a handkerchief, threw it on the ground, and ordered Mrs. Jacobs to dress.

After Mrs. Jacobs had dressed, defendant asked her how much money was in her purse. She told him that the purse contained about a dollar and a half or a dollar and seventy-five cents. Defendant asked her the question again, threateningly, and when she gave the same reply he struck her on the chin with his fist. Mrs. Jacobs fell to the ground and defendant removed her wrist watch from her arm and left the scene. Mrs. Jacobs remained on the ground for a few minutes in a dazed condition and heard a motor start. She returned to the road to find that her automobile and purse were gone. People living in a tent nearby transported her to town where she made a report to the police. At that time she was distraught and her jaw was badly bruised.

Defendant, meanwhile, returned to town. He met an accomplice, not a party to this appeal, and together they used Mrs. Jacobs's automobile to follow an automobile driven by Mrs. Elsie F. Phelps. Mrs. Phelps noticed the pursuing car and drove to the side of the street, slowing down, to allow it to pass. Defendant passed Mrs. Phelps and drove diagonally in front of her car and stopped, thus compelling her to stop. Defendant walked over to Mrs. Phelps and told her that she had been driving too fast, and when she disagreed with him he opened her car door and told her to move over. Mrs. Phelps refused and defendant held a gun against her stomach, reached across her body and removed her purse, which was on the seat to her right. This purse contained a pencil, personal items, eight dollars, a billfold and a coin purse. Defendant returned to Mrs. Jacobs's automobile and drove away, but Mrs. Phelps meanwhile ascertained the license number.

Defendant returned to his place of residence at about 10 p. m. after parking Mrs. Jacobs's car about a block and a half away. Soon after, the police arrived and made inquiries of the owner concerning a person of his description. They did not search the place, and defendant remained in a back room out of sight. He went to Oakland or San Francisco at about midnight with friends. Two days later he sold his gun and Mrs. Jacobs's wrist watch to a woman in San Francisco and on March 25, 1946, he was arrested in that city. A search of his person resulted in the recovery of Mrs. Phelps's pencil. He was wearing a jacket described and recognized by both Mrs. Phelps and Mrs. Jacobs.

Defendant made a voluntary unsigned and unsworn statement in the presence of police officers and representatives of the district attorney's office. This statement was taken down by a stenographer and then transcribed. Defendant admitted therein substantially all the facts described above, but could not recall striking Mrs. Jacobs with his fist. He attributed his conduct to drinking and to smoking marihuana cigarettes, although he admitted that at the time of the commission of the charged offenses he knew that his conduct was wrongful.

Defendant was clearly identified as the person who sold the gun and wrist watch in San Francisco. Mrs. Jacobs identified him as her attacker by selecting him from a group of men. Mrs. Phelps identified him by his walk and his features. Mrs. Jacobs's testimony was strengthened by the recovery of the handkerchief, which proved to contain spermatazoa upon laboratory examination. Doctors and witnesses testified to the bruise on her left jaw and a photograph taken on March 27, 1946, showed that her jaw was still discolored.

[1] The controlling question on this appeal is whether the acts of defendant constituted kidnaping for the purpose of robbery as defined in section 209 of the Penal Code. Section 209 is concerned with one of the most serious types of kidnaping, the spiriting away of individuals for the purpose of extortion, robbery or ransom, and authorizes the jury to impose the death penalty if the victim suffers bodily harm. Section 209 as amended in 1933 provides: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall

be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

This section makes it unnecessary to determine whether the kidnaper intended to commit extortion or robbery at the time of the original seizure or carrying away. It is sufficient if the extortion or robbery was committed during the course of the abduction. Thus, whatever may have been the original motive of the kidnaping, if the kidnaper commits extortion or robbery during the kidnaping, he "holds or detains" his victim "to commit extortion or robbery" within the meaning of section 209.

[2] The evidence shows without conflict that defendant forced Mrs. Jacobs to drive her automobile to a destination selected by him and upon arrival to walk up a hill where she was forcibly detained while defendant raped and robbed her. While Mrs. Jacobs lay on the ground after the defendant struck her, and therefore while the kidnaping was still continuing, he robbed her of her purse, wrist watch, and automobile. These acts clearly constituted kidnaping for the purpose of robbery as that crime is defined in Penal Code section 209. People v. Tanner, 3 Cal.2d 279, 296, 44 P.2d 324.

The trial court, in instructing the jury on the nature of the penalties for the crime, referred to the crime as "Kidnapping, as it has been defined to you," "Kidnapping as charged in Count Three of the Information" and "Kidnapping as charged in the Information." The crime had been previously defined, in the instructions, as follows:

"Section 209 of the Penal Code of the State of California provides so far as pertinent, as follows:

"'Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual, to commit robbery is guilty of the crime of Kidnapping.'"

[3] Defendant contends that the jury could not reasonably be expected to remember the charges contained in the information, that the crime defined by the trial court was not kidnaping, but kidnaping for the purpose of robbery and that, therefore, the jury was not informed as to the offense for which it prescribed the death penalty. Even if the jury did not remember the words of the information, the trial court correctly defined the offense charged, namely, kidnaping for the purpose of robbery. It is immaterial that the crime was designated simply as "kidnapping" rather than "Kidnapping for the purpose of robbery" since the latter is kidnaping within the meaning of section 209 (People v. Tanner, supra, at page 296 of 3 Cal.2d, at page 330 of 44 P.2d) and the instruction was concerned only with that type of kidnaping. Section 209 itself, after defining the particular offense in detail, describes it as "kidnapping." The trial court later, when instructing the jury as to the form of its verdict, referred to the crime as "Kidnapping for the Purpose of Robbery" and the jury used those words in its verdict. The jury was adequately informed of the nature of the crime with which defendant was charged and its instruction was neither confusing nor erroneous.

[4, 5] The finding of the jury that Mrs. Jacobs suffered bodily harm is clearly supported by the evidence. "*Bodily harm* is generally defined as 'any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person.'" People v. Tanner, supra, at page 297 of 3 Cal.2d, at page 332 of 44 P.2d. The forcible rape itself was bodily harm. Any statement to the contrary in People v. McIlvain, 55 Cal.App.2d 322, 332, 130 P.2d 131, is disapproved. In addition to the rape defendant knocked Mrs. Jacobs to the ground with a vicious blow to her chin, which remained bruised and discolored for several days.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

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77 Cal.App.2d 910

AVILES et al. v. PACIFIC GREYHOUND LINES.

Civ. 15507.

District Court of Appeal, Second District, Division 2, California.
Feb. 4, 1947.

Trial 🔑252(8)

An instruction relating to highway designated and sign posted for one way traffic was properly refused in absence of any evidence or stipulation that the highway on which the accident occurred was designated or sign posted for one way traffic. Vehicle Code, § 525(a) (4).

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by John Aviles, Jr., John Aviles, his guardian ad litem, and John Aviles against the Pacific Greyhound Lines, a corporation, and James Kuntz for personal injuries sustained when John Aviles, Jr., who was riding his bicycle, was struck by a bus. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Frank T. Hennessey and Albert E. Wheatcroft, both of Los Angeles, for appellants.

Bauder, Veach & W. I. Gilbert, of Los Angeles, for respondents.

WILSON, Justice.

This appeal is without foundation and without merit. The minor plaintiff and his father sued to recover for personal injuries received by the minor, who will be referred to for convenience as "appellant," and for medical expenses paid out by the father. A verdict was returned in favor of defendants and the appeal is from the judgment entered on the verdict.

The accident occurred on Lankershim Boulevard where it passes under the tracks of the Southern Pacific Railroad. The highway, approaching and through the underpass, is divided by a concrete abutment extending along its center line, with three traffic lanes on each side of the abutment. Appellant and a companion were riding their bicycles in a northerly direction on the right-hand side of Lankershim Boulevard on the downgrade approaching the underpass. Plaintiff separated from his companion, turned to his left, and was struck by a bus belonging to defendant corporation on the upgrade leading from the underpass. Appellant and his companion testified that the movement of the former was gradual from right to left, while the bus driver and two passengers testified that he turned suddenly in front of the bus when it was from 10 to 20 feet behind him. His companion saw the bus and called "look out." Whether appellant heard the warning or not is in doubt but in any event he did not heed it. The collision took place near the curb on the left-hand side of the northbound highway.

Appellant concedes that the evidence is so conflicting that it would support a verdict for either party. His only assignment of error is the failure of the court to give an instruction requested by him reading as follows: "You are instructed that the requirement that a person drive as close as practical to the right-hand curb or edge of a roadway has no application to a roadway designated and signposted for one-way traffic. In this case it has been stipulated that the roadway on which the plaintiff and defendant's motor bus was traveling is a roadway designated and signposted for one-way traffic."

In support of his contention that the proposed instruction should have been given appellant states in his brief: "It was stipulated that the highway where the accident occurred was a one-way street and was signposted and designated as such." Again he says: "The fact that the highway was a one-way street was a stipulated fact in evidence." Notwithstanding that his error in so stating the stipulation is pointed out in respondent's brief he returns to the attack with the same groundless recital in his reply brief. This reiterated statement is devoid of support in the record. The stipulation in the transcript adverted to by appellant contains no reference whatsoever to the character of the highway or to any fact involved in the case. It reads as follows: "Whereupon it was stipulated by counsel for the respective parties that a map and seven pictures which purport to be a pictorial representation of the highway leading up to the underpass on Lankershim Boulevard, with the position of the camera and the view indicated in it on the back of each picture, may be introduced in evidence and marked Plaintiffs' Exhibit[s] 1 and 2 respectively."

We have examined the exhibits referred to in the stipulation and find an utter absence of evidence that the highway is a one-way street. The exhibits consist of a large map delineating the highway under and on both sides of the railroad tracks and several photographs of the highway looking both northerly and southerly at the scene of the accident. The only sign shown in the photographs is one indicating a cross-road at the northerly end of the exit from the underpass. There is no designation of any part of the highway as a one-way street. The map, drawn to scale by an engineer, purports to illustrate all parts of the highway and all objects thereon, including one or more lamp posts in the concrete abutment dividing the highway. No sign of any character is indicated on the map.

Appellant's entire argument in support of his assignment of error is based on the theory, unsubstantiated by evidence or stipulation, that the highway at the point of the accident is a one-way street and that traffic thereon is subject to the provisions of section 525(a) (4) of the Vehicle Code.

Since the purported stipulation claimed by appellant to have been made was in fact not made, and since the record is barren of evidence that the roadway was designated or signposted for one-way traffic, there was no basis for the instruction and the court properly refused to read it to the jury.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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77 Cal.App.2d 912

PETRO v. MARTINEZ.

Civ. 15587.

District Court of Appeal, Second District, Division 2, California.
Feb. 4, 1947.

1. Appeal and error 🔑110

Order denying plaintiff's motion for new trial on ground of insufficiency of evidence is not appealable.

2. Appeal and error 🔑756

A brief did not conform to the rules where the points raised did not appear under headings descriptive of the subject matter covered and where brief was not prefaced by a topical index of its contents. Rules on Appeal, rule 15.

3. Appeal and error 🔑1011(1)

Where conflict in evidence is not slight but real and substantial, findings of trial court are final and cannot be disturbed on appeal.

4. Municipal corporations 🔑706(5)

In action for personal injuries sustained by plaintiff pedestrian, when defendant allegedly ran into plaintiff causing her to fall while plaintiff was waiting for bus, evidence supported judgment for defendant on ground that he was not negligent.

◆

Appeal from Superior Court, Los Angeles County; James M. Allen, Judge.

Action by Bessie Petro against Ernest Martinez for personal injuries allegedly sustained when defendant collided with plaintiff. From an adverse judgment and from an order denying her motion for new trial, plaintiff appeals.

Judgment affirmed, and appeal from order denying a new trial dismissed.

Alfred F. Baughn and Richard Newton, both of Los Angeles, for appellant.

Mitchell, Johnson & Bates, of Los Angeles, for respondent.

WILSON, Justice.

[1, 2] While plaintiff was standing in a passenger safety or loading zone awaiting the arrival of a red bus going south on Pacific Avenue in Huntington Park, a yellow bus going south stopped opposite the safety zone. Defendant stepped from the rear door of the bus into the zone where the parties collided causing plaintiff to fall. She brought this action to recover damages for the resulting injuries suffered by her. The case was tried by the court without a jury. Judgment was rendered in favor of defendant from which plaintiff appeals.* There is an attempted appeal from the order denying plaintiff's motion for a new trial which must be dismissed since such order is nonappealable.

The findings of fact are that plaintiff's injuries were not suffered by her as the direct or proximate result of any careless or negligent conduct of defendant, and that the evidence presented at the trial was conflicting.

[3] Appellant asks this court to analyze the evidence, to accept her version of the facts concerning the collision between her and respondent, and to hold that the preponderance of the evidence lies in her favor. Since the conflict in the evidence is not slight but is real and substantial the findings of the trial court are final and the prayer for a reversal of the judgment is made without avail.

[4] Appellant testified that she was waiting in the safety zone to board a red bus; when the yellow bus stopped she was standing about three feet south of its rear door; the red bus pulled up and stopped at the rear of the yellow bus; she saw respondent stand up about the middle part of the front section of the yellow bus and run to the rear; she did not move after the bus stopped but remained standing in the same position, still about three feet south of the door; when the door opened respondent jumped out and struck her right shoulder causing her to fall to the pavement.

Respondent testified that he was sitting on the rear seat of the bus; he arose and stepped on the treadle at the rear door and waited for the bus driver to open the door; he looked through the glass panels of the door and saw no one standing in the safety zone; when the door was opened he stepped down (did not jump) and as he did so appellant was "coming by, and we collided."

While the conflict in the evidence renders a discussion of it unnecessary, it may be noted that if appellant was, as she testified, standing still and facing the southbound bus she was facing east and her left side was toward the rear door of the bus, and when respondent stepped from the door, which was north of where appellant was standing, he would have struck her left side or shoulder. On the other hand, if she was walking north, as respondent testified, her right side would have been toward the door. She testified that respondent struck her right shoulder. In view of the conflict in the testimony as to all the occurrences from the time the bus stopped until the parties collided (a) whether respondent ran from the middle of the bus or was seated at the rear; (b) whether he jumped or stepped from the bus; (c) whether when appellant was struck by respondent's body she was facing east and standing still or was "coming by," walking north toward the red bus for which she had been waiting, nothing further need be said than that the findings of the trial court will not be disturbed. Buckhantz v. R. G. Hamilton & Co., 71 Cal. App.2d 777, 779, 163 P.2d 756, and cases cited.

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* Appellant's brief does not conform to the requirements of Rule 15 of the Rules on Appeal (22 Cal. 2d 1, 12) which became effective July 1, 1943, in that (a) the points raised do not appear under headings descriptive of the subject matter covered, in fact the brief contains no headings at all, and (b) it is not prefaced by a topical index of its contents.

Judgment affirmed. The appeal from the order denying a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.

78 Cal.App.2d 33

PEOPLE v. ROBBINS.

Cr. 4027.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1947.

Automobiles 🔑355(10)
Larceny 🔑55

Evidence sustained convictions of unlawful taking or driving of an automobile without owner's consent and of petty thefts. Vehicle Code, § 503.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Stanley J. Robbins was convicted of violating Vehicle Code, § 503, and of petty thefts, and he appeals.

Judgments affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., of San Francisco, for respondent.

SHINN, Justice.

Appellant was found guilty in a trial before the court, without a jury, of two felony counts and appeals from the judgments of conviction.

About 9:15 or 9:20 p. m., July 22, 1945, Mr. and Mrs. Eric J. Carter parked their 1937 Buick four-door sedan at an unattended parking lot at Winston and Main Streets in Los Angeles. Mrs. Carter locked the doors to the car and they proceeded to a theater. Upon returning for the car about midnight that same date they found it to be missing; they had given no one permission to use it. The next time the Carters saw their car it was at a garage, one tire was flat, it was out of gas and the right-hand windbreaker glass was sprung loose. One Hogan testified that at approximately midnight on July 22, 1945, he was on the fire escape on the seventh floor of the Dorman building, 741 South Flower Street, which overlooked a parking lot south of the building near Flower and Eighth, when he saw a man drive a sedan off Eighth Street onto the parking lot, stop, get out of the sedan and immediately walk to a car adjacent to where he had parked; that the man manipulated the front window near the driver's seat and opened the door by reaching through the window, got into the car, and rummaged through the glove compartment. He then saw the man attempting to gain entrance into a convertible coupe by tampering with the window. Hogan called the police, which took him about two minutes. When he returned the man he had seen was in the convertible and was going through the glove compartment. While going through the second car the man started to use a flashlight, which he had not done on the first car. Hogan continued to watch this man until the police officers arrived, and saw them apprehend him. There was but one man on the lot before the police arrived, and Hogan called down to the police that appellant was the man he had seen get out of the car and go through the two parked cars. He then went down to the parking lot and identified appellant as the man who had driven into the lot and had entered the cars. The police officers, upon arresting appellant, took from him a flashlight, a long knife, a fountain pen, a screw driver and a 12-inch wire, the ends of which were bare and which is commonly called a jump wire. The Carter Buick was also recovered at this time, it being the car that had been driven onto the lot.

On that same July 22d, at about 4 p. m., one Hilty, a witness for the People, had parked his car in the parking lot next to the parking lot near Flower and Eighth Streets, leaving his flashlight in the glove compartment of his car. Hilty had parked the car himself and locked it. The last time prior to the parking of his car that he had seen his flashlight was on the morning of the 22d of July when he had washed and serviced his car. Hilty returned to his car about 12:10 a. m., July 23, and upon going to his automobile found it open, the right-hand window being broken and the glove compartment open. He searched the glove compartment and found that his flashlight was missing, although he had given no one permission to take it. Officer Hansen, after having asked Hilty if he lost a flashlight and receiving an affirmative reply, told him that he had a three-call flashlight that they would like to hold as evidence and Hilty gave him permission to keep it. Hilty gave the value of the flashlight as approximately $3 and on the stand identified as his the flashlight taken from appellant.

Appellant denied on the stand that he had stolen the Carter automobile or any other automobile, stating that he had merely gone to the alley to urinate and was apprehended by police when he was leaving the lot. He testified that prior to going into the alley and lot he had gone to a theater for the evening. He further testified that he was beaten by the police officers in an attempt to make him confess and that he continually denied any complicity in the offenses. Appellant admitted his prior conviction as charged. No confession or admission was introduced in evidence by the People.

The sole ground of appeal is that the evidence was insufficient to justify the finding of guilt of violation of section 503 of the Vehicle Code or of the charge of petty theft. It is insisted that there was no sufficient identification of defendant as the man who drove the Carter car onto the lot or as the man who was seen going through the other cars. It is pointed out that the witness Hogan was on a fire escape at the seventh floor of an adjoining building, and it is contended that he could not have identified defendant from that distance. His identification did not rest upon his ability to observe defendant from that distance with sufficient certainty to enable him to identify him later. His identification did not rest upon what he saw of defendant's features, clothing, or general appearance. He testified that the man who drove the Carter car onto the lot was the man who went through the other automobiles, using a flashlight in the second one which he did not use in the first one. He saw the officers arrive and from his distant location he called to the police, saying that the man they had taken into custody was the one he had seen get out of the car and go through the two parked cars, and he also pointed out the Carter car. He was then asked by the police to come down to the lot, which he did. His identification of defendant was based upon the fact that when he got to the lot he found that the man he had been watching and whom he pointed out, and who was under arrest, was the defendant. The record shows that the trial judge carefully weighed the testimony of the witness Hogan and found nothing therein which caused him to question its truth. The motor of the Carter car was still hot, showing that it had recently been driven, and there was no testimony that there was any one other than defendant on the lot who might have driven it in. The officers testified that the flashlight was taken from defendant's pocket, and the owner of the first car that had been entered identified the flashlight as his own. Although the officers testified that they also took from defendant a long knife, a fountain pen, a screw driver, and a 12-inch piece of wire, defendant did not deny having had the wire in his pocket nor offer any explanation as to his purpose in carrying it. The trial judge might reasonably have believed that it was a wire that could have been used for the purpose of opening locked cars. There was sufficient evidence to support a finding that defendant was guilty of the two offenses of which he was convicted.

The judgments are affirmed.

DESMOND, P. J., and WOOD, J., concur.

PEOPLE v. SLOBODION.*

Cr. 2433.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1947.

Hearing Granted March 6, 1947.

1. Criminal law 🔑1081

Evidence taken by referee on motion to dismiss appeal from conviction of felony for failure to file notice of appeal within 10 days after rendition of judgment established that notice of appeal was deposited in regular mail processes of penitentiary within statutory period, but due to failure of such processes to function properly was not actually mailed until several days later. Rules on Appeal, rule 31.

2. Appeal and error 🔑356
Criminal law 🔑1069(6)

The time requirements for taking an appeal are mandatory both in civil and criminal cases, and appellate courts are without jurisdiction to consider an appeal taken after expiration of the statutory period, but appellate court may relieve appellant from his default where failure to file notice of appeal in time is the result of fraud, duress or imposition by adverse party. Rules on Appeal, rule 31.

3. Criminal law 🔑1081

Where failure to file notice of appeal within time limited by law is due to inadvertence or mistake of a party or his attorney, neither trial court nor appellate court can afford relief by permitting filing of a tardy notice. Rules on Appeal, rule 31.

4. Constitutional law 🔑56

The District Court of Appeal derives its power to hear appeals from the Constitution itself and not from statute and while legislature or Judicial Council may provide rules under which such power can be exercised, no law-making body has the power to take away court's constitutionally granted powers.

5. Criminal law 🔑1192

An appellate court loses jurisdiction of case when it sends down its remittitur, but where the ends of justice require, the remittitur may be recalled, since a court may not lose jurisdiction by fraud or imposition.

6. Criminal law 🔑1069(6)

Where appellant has taken every step required by law within the time required by law to perfect appeal in a criminal case, and negligence of state employees is the sole reason that appeal is not filed, justice requires that appellant be relieved from the default.

7. Criminal law 🔑1081

Where notice of appeal from conviction of felony was deposited in regular mail processes of penitentiary four or not later than eight days after rendition of judgment, but due to negligence of prison employees was not mailed until several days later, appellate court would order notice filed nunc pro tunc as of date on which it should have been mailed and would direct trial court reporter to prepare transcript on appeal. Rules on Appeal, rule 31.

◆

John Slobodion was convicted of felony and he appeals. On motion to dismiss appeal and motion of appellant to compel trial court reporter to prepare transcript of the trial.

Notice of appeal ordered filed nunc pro tunc, reporter directed to prepare transcript on appeal and motion to dismiss appeal denied.

John Slobodion, in pro per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

This is a motion by respondent to dismiss this appeal on the ground that the notice of appeal was filed too late.

The following dates are admittedly correct:

June 11, 1946—defendant found guilty of two felonies.

June 13, 1946—rendition of judgments.

June 15, 1946—appellant received at San Quentin.

June 28, 1946—the clerk of the Superior Court received through the mails and filed a notice of appeal from the judgments.

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* Subsequent opinion 181 P.2d 868.

This notice was postmarked San Quentin, June 27, 1946, and the records of that institution disclose that the document was in fact mailed that day.

Rule 31 of the Rules on Appeal provides that an appeal in a criminal case may be taken "by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment." The time for appeal elapsed on June 23, 1946, and the notice filed on the 28th was obviously filed late. It is on this ground that respondent has moved to dismiss.

In opposition to the motion the appellant, who is appearing in propria persona, filed an affidavit in which it was charged that he had in fact deposited the notice of appeal in the mailbox at San Quentin as early as June 17, 1946, well within the statutory time, and that the failure to have the notice placed in the United States mail until the 27th was the fault of the prison employees. Certain counter-affidavits were filed by prison employees in which certain of the facts averred by appellant were contradicted. In view of this conflict, this court appointed Andrew R. Schottky, Judge of the Superior Court of the County of Mariposa, referee to ascertain the true facts. Pursuant to this order Judge Schottky held a hearing at San Quentin at which the appellant, the employees in question and a deputy attorney general were present. At this hearing the appellant testified that he dropped the letter containing his notice of appeal in the prison mail box on June 17th; that it was returned to him by the mailman of his cell block on the night of June 20 without explanation; that on the morning of June 21, he went to the mailing office and talked with Mr. Kehoe, the sergeant in charge of the mail; that Kehoe, in his presence, interrogated several persons in an effort to determine why the letter had been returned; that no one seemed to know; that he told Kehoe of the nature of the document and the importance of having it mailed at once; that Kehoe took the letter and promised to have it taken care of; that he did not know that it had not been mailed in time until the reporter refused to prepare the transcript on appeal. Not one word of this testimony was contradicted by the employees involved. Kehoe testified that he had no recollection of such a conversation with appellant, but stated that he was so busy in the mail office that he could not remember the various conversations with the inmates; that while he could not remember the conversation it may have occurred, and he would not say that it had not; that all legal documents had to be cleared with the warden before they could be mailed; that the records of the prison do not show when documents are received from the inmates, but only show when they are in fact mailed after clearing with the prison officials; that on June 23, he went on his vacation; that he cannot explain why the document was retained and not mailed sooner. John Short, the Assistant Parole and Classification Officer, an employee of the prison who apparently discusses legal problems with the inmates and with whom appellant stated he talked about the matter, had a record that showed that an interview with appellant had taken place on the date testified to by appellant, but he had no recollection at all of what was discussed; that his statement in his affidavit as to the contents of such conversation was probably in error; that he would not deny that the conversation had taken place as testified to by appellant.

On this evidence Judge Schottky found that "in view of the clear testimony of appellant and the indecisive and unsatisfactory testimony of the other two witnesses and after having heard the testimony and observed the witnesses as they were testifying, I must find that the evidence preponderates in favor of the statement of appellant Slobodion that he did deposit his notice of appeal in the regular mail processes of San Quentin Penitentiary on June 17, 1946, and certainly not later than June 21, 1946. I do not believe that there was any desire or intention on the part of any of the employees at San Quentin to deprive appellant of his right of appeal but that in some manner the ordinary and usual processes of receiving and sending out mail failed to function in this particular case."

[1] We have read the record. The above finding is not only amply supported,

but in view of the record no other finding reasonably could have been made. We adopt said finding as the finding of this court.

The problem thus presented can be simply stated. Where an appellant is incarcerated by the State and desires to appeal, where he takes every step he can possibly take to perfect his appeal, where he delivers his notice of appeal to the prison authorities well within the statutory period with a request to mail it, and when the prison authorities carelessly and negligently fail to mail such notice, is the appellate court powerless to grant him relief? If any such power exists under any circumstances it is quite apparent it should be exercised in this case.

[2] It has frequently been held in this state, both in civil and criminal cases, that the time requirements for the taking of an appeal are mandatory, and that the appellate courts are without jurisdiction to consider an appeal taken subsequently to the expiration of the statutory period. In re Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, and cases cited therein; People v. Lewis, 219 Cal. 410, 27 P.2d 73, and cases cited therein. In the Estate of Hanley, in a civil case, it was held that such rule applied even where the respondent innocently misled the appellant as to the time within which to appeal, and it was held by dicta that such rule applied even where the respondent was guilty of active fraud or bad faith. This holding, insofar as the dicta is concerned, is clearly contrary to the weight of authority. The substantial weight of authority is to the effect that where the failure to file the notice of appeal is the result of fraud, duress, or imposition by the adverse party it will constitute grounds to warrant an appellate court in relieving the appellant from his default. (See cases collected in an annotation, 149 A.L.R. 1261; see cases collected in note, 32 Cal.L.Rev. 84.) In fact there is direct authority in this state to the effect that where the respondent by fraud or imposition prevents the appellant from filing his notice of appeal the respondent is estopped from urging the point that the notice was filed too late. Moyle v. Landers, 78 Cal. 99, 20 P. 241, 12 Am.St.Rep. 22. Strangely enough the majority opinion in the Hanley case cites the Moyle case for the proposition that a stipulation of all the parties that an appeal may be filed late cannot confer jurisdiction, but does not note that the case directly held that fraud was ground for relief. Neither of the dissenting opinions in the Hanley case refers to the Moyle case.

[3] In criminal cases the rule has been frequently stated as it appears in People v. Lewis, 219 Cal. 410, 414, 27 P.2d 73, 74: "Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice."

[4, 5] The basis for the rule is that the time limit for appeal is "jurisdictional." But this factor cannot be an absolute bar to a late filing because that rule is of well nigh universal application (see cases collected 4 C.J.S., Appeal and Error, § 428, n. 92, p. 884) and exists in the many states where some limited form of relief can be secured. It must be remembered that the only bar to hearing this appeal exists by virtue of a rule of court which has the force of a statute. This court, of course, derives its power to hear appeals not from any statute but from the Constitution itself. While the Legislature or the Judicial Council undoubtedly have the power to provide the rules under which that power can be exercised, no lawmaking body has the power to take away from this court its constitutionally granted powers. If it once be held that when the Legislature has adopted a regulatory statute, such as providing that an appeal must be taken within a specified time, there are no conceivable circumstances that would justify a court in relieving for failure to file in time, then the Legislature could practically deprive a court of its constitutionally granted powers. The mere statement of such a proposition demonstrates its unsoundness. Certainly the California courts have not been so sensitive about so-called "jurisdictional" requirements in analogous situations where the ends of justice require it. Thus, when an appellate court sends down its remittitur it loses "jurisdiction" of the

case, but it is elementary law that where the ends of justice require it the remittitur may be recalled. (See cases commented on 23 Cal.L.Rev. 354.) The basis of this rule is that a court cannot lose jurisdiction by fraud or imposition, and the theory is that by reason of the fraud or imposition the court never has lost jurisdiction. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006. It would seem to follow that fraud or imposition cannot operate so as to prevent an appellate court from acquiring its constitutionally granted powers in the first instance.

In the instant case there was no fraud, but there was negligence on the part of the prison employees. In other words, the State seeks to dismiss this appeal when the negligence of state employees is the sole reason that the appeal was not filed in time. It would be a strange doctrine that would permit the State to dismiss an appeal because it was not filed in time when that failure was caused by the State itself. If any such doctrine were once adopted it would mean that the right of appeal in criminal cases could be denied, where the person convicted desires to appeal in propria persona, by the simple device of the prison officials delaying the mailing of the notice of appeal. The inmate would be powerless to prevent such delay. The right of appeal is too important a right to rest on such an illusory and unsubstantial foundation. It would approach a denial of due process and equal protection of the laws to hold that the State could thus take advantage of the negligence and carelessness of its own employees.

[6] For these reasons we hold that, whatever the rule may be in civil cases, in criminal cases, where the appellant has taken every step required by law within the time required by law to perfect his appeal, and the sole reason that the appeal is not filed is the negligence of state employees, the ends of justice can only be served by relieving from the default and thus protecting the constitutional powers of this court and the fundamental rights of appellant.

The appellant has filed a motion to compel the trial court reporter to prepare the reporter's transcript of his trial. The reporter refused to do so apparently on the ground that the appeal had been taken too late.

[7] It is ordered that this notice of appeal be filed nunc pro tunc as of June 21, 1946, that the reporter be directed to prepare the transcript on appeal, and that this motion to dismiss be denied.

WARD, J., concurs.

77 Cal.App.2d 894

ENGLISH v. CITY OF LONG BEACH et al.

Civ. 15404.

District Court of Appeal, Second District,
Division 1, California.
Feb. 4, 1947.

As Modified on Denial of Rehearing
Feb. 24, 1947.

1. Municipal corporations 🔑**216(2)**

A city charter authorizing civil service board to adopt rules providing for appointment and "employments" in all positions of classified service authorized adoption of rule requiring all employees to pass a physical examination after a six months' absence "for any reason".

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

2. Municipal corporations 🔑**185(14), 216(2)**

A rule of civil service board requiring employee absent from duty "for any reason" for six months or more to pass a physical examination was not inconsistent with rule providing that at expiration of leave of absence employee should be returned to former position, so as to entitle patrolman absent for more than six months to reinstatement without physical examination, since rule requiring physical examination does not automatically disqualify such employee from resuming employment.

3. Municipal corporations 🔑**185(14)**

A patrolman's sick leave and vacation absence which preceded final six months leave were not improperly considered as absence from duty requiring patrolman to submit to physical examination under rule of civil service board requiring all employees absent for six months or more to submit to physical examination on ground that rule dealing with promotions defined "active service" as time "during which the employee is carried on the payroll in the position from which promotion is sought" and patrolman was carried on payroll during sick leave and vacation.

4. Mandamus 🔑168(3)

In proceeding to compel city to reinstate patrolman without physical examination which was required under rule of civil service board of employees absent for six months or more, police directive placing all members of department on active duty in event of emergency whether on vacation or not was properly excluded where there was no showing that patrolman would have been physically able to comply with directive had he been required to report for duty in emergency.

5. Estoppel 🔑62(5)

In proceeding to compel city to reinstate patrolman, evidence that captain had advised patrolman that he could return at any time within six months' leave of absence without taking physical examination was not admissible on theory of establishing an estoppel on part of city which sought to enforce rule of civil service board requiring patrolman absent for six months or more to pass physical examination, or to show alleged contemporaneous construction of the rule.

6. Municipal corporations 🔑185(14)

Under rule of civil service board providing that if employee in classified service has been absent from duty "for any reason" for six months or more, he shall be required to pass physical examination, a patrolman who had been absent on authorized sick leave followed by vacation which was followed by six months' leave of absence with approval of city council was not entitled to reinstatement without physical examination.

7. Municipal corporations 🔑185(14)

Where patrolman reported for duty July 16, 1945, and no written charges were served on him until August 3, 1945, he was entitled to compensation from city for that period though he was not entitled to reinstatement without a physical examination.

Appeal from Superior Court, Los Angeles County; Martin De Vries, Judge.

Mandamus proceeding by Henry W. English against City of Long Beach and others to compel the city and its officials and the Civil Service Board to permit the petitioner to resume duties as a patrolman in the police department after an authorized leave of absence, and to compel payment of petitioner's salary. From an adverse judgment, petitioner appeals.

Modified and affirmed.

Kenneth Sperry, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

DORAN, Justice.

This is an appeal from a judgment in favor of respondents in a mandamus proceeding brought by appellant for the purpose of compelling the respondent City, its administrative officials and Civil Service Board, to permit appellant to resume duties as a "patrolman" in the Police Department, after an authorized leave of absence, and to compel the payment of appellant's salary. The principal issues involved herein have to do with the legality and effect of certain rules adopted by the Civil Service Board under which appellant was required to take and pass a physical examination as a prerequisite to the resumption of duties.

The appellant was duly appointed to the position of patrolman on July 16, 1942. On December 24, 1944 appellant was absent from duty on authorized sick leave which continued until January 9, 1945 at which time the patrolman was permitted to take a vacation until January 23, 1945. On the latter date Patrolman English was granted a six months' leave of absence with the approval of the City Council, such leave expiring on July 22, 1945. Previous to expiration of this leave of absence, and on July 16, 1945, appellant reported for duty and filed with the City Health Officer a certificate of an attending physician pursuant to Section 70.80 of the Sick Leave Ordinance, to the effect that "Mr. English was sufficiently restored to health so as to be able to efficiently perform the duties of his position, namely, that of a patrolman in the police department". Captain Otto Faulkner, in charge of police personnel, testified that appellant was not permitted to resume the duties as patrolman because "At the time he reported I was advised by the Civil Service Commission that he had been absent longer than six months and would have to take a medical examination, and the doctor refused him to return because of an ailment". The ailment in question was specified as "Valvular Heart Disease". On August 3, 1945 appellant filed a petition for peremptory writ of mandate seeking the right to resume employment, and on the same day the City Manager filed with the Civil Service Board, charges against appellant upon the ground that the patrolman had failed to pass the physical examination, and upon the further ground that the medical examinations "indicate that you have contracted a physical ailment or defect, which incapacitates you for the proper performance of the duties of your position, * * *". The notice of appellant's dismissal upon such charges further specified that the matter might be appealed to the Civil Service Board within five days, in accordance with the provisions of Section 4, Rule XIV of the Rules and Regulations of the Civil Service Board.

The trial court found that appellant was not entitled to a peremptory writ of mandate, and that since appellant's entire absence from duty from December 25, 1944 to July 16, 1945 amounted to more than six months, Section 13 of Rule V of the Rules and Regulations of the Civil Service Board was applicable. Section 13 provided that "If an employee in the classified service has been absent from duty *for any reason* for a period of six (6) months or more, he shall be required to submit to and pass the physical examination as provided in Section 12 of this rule, before he shall be eligible or entitled to return to active duty. * * * Failure to pass such examination shall constitute grounds upon which such employee may be either temporarily suspended or permanently dismissed * * *". (Italics added.)

Appellant first contends that "The provisions of Sections 12 and 13 of Rule V were not intended to apply to petitioner (appellant)", and that Rule IX containing special requirements for *applicants* for the position of patrolman, and requiring such applicants to pass a physical examination before appointment, "should be construed as an exception to the provisions of Rule V". In this connection it is urged that "a general provision is controlled by one that is special, the latter being treated as an exception to the former"; further, that confusion would result from an attempt to apply Section 13 of Rule V requiring an examination after six months' absence. However, a reading of the above rules discloses no inconsistency nor any reason for confusion; nor does the phraseology indicate any intention to make the police department an exception to the rule requiring a physical examination. The fact that applicants for appointment to the position of patrolman are required to pass strict physical examinations has no bearing upon the present issue.

[1] What may be denominated as appellant's principal contention is stated as follows: "Sections 12 and 13 of Rule V are invalid in so far as they purport to require re-examination of a patrolman as a condition precedent to his return to duty during or after an authorized leave of absence". It is insisted that the Civil Service Board was without power to adopt such a rule due to the fact that the Board is one of limited power, and that under the City Charter "The only rule making power * * * particularly with respect to regulating the Police Department, relates only to prescribing the physical fitness of police officers at the time of their original appointment". The rule-making power of the Board is prescribed by Section 102 of the City Charter as follows: "The Civil Service Board, subject to the approval of the City Council, shall adopt, amend and enforce a code of rules and regulations, providing for *appointment and employments* in all positions in the classified service, based on merit, efficiency, character and industry, which shall have the force and effect of law". (Italics added.) Appellant contends that the italicized phrase "appointment and employments" is not broad enough to cover the disputed rule requiring all employees to pass a physical examination after a six

months absence. The respondent affirms, however, that the word "employments" is not synonymous with "appointment", and "was used in its broader sense and was intended to cover the relationship between the City of Long Beach and its employees"; further if any doubt existed in reference thereto, contemporaneous construction indicates that the word "employments" was given the broader interpretation.

Although dictionary defienitions of the term "employment" are not particularly helpful in the present controversy, it seems clear that the word may be properly accorded a broad and liberal interpretation. The Cyclopedic Law Dictionary defines employment as "A business or vocation, * * * calling office; service; commission, trade; profession * * * The service of another. * * * the act of employing, *in another sense, the state of being employed.*" (Italics added.) In 20 Corpus Juris, page 1245, the following appears, "The word is not of the technical language of the law, or of any science or pursuit, and must be construed according to the context and approved usage of the language. It has been variously defined as the act of attending to the duties and services of another; * * * the act of employing or using; *agency or service for another or for the public; * * * the state of being employed*". (Italics added.) In the present case the respondent's interpretation of the word seems the more reasonable. The curtailment of the rule-making power in the manner contended for by appellant, appears to be an unwarranted construction of the charter. There is nothing in the cases cited, by way of contemporaneous construction, or otherwise, which would justify a holding that the rule-making power in question should be given a rigid, highly technical interpretation inimical to a proper administration of the police department, and to the public interest. As said in the respondent's brief, "Certainly the framers of the Charter did not intend that the Police Department be composed of men physically unqualified to perform the duties required of its members".

[2] Appellant insists that the rule in question is inconsistent with other rules, and calls attention to the provisions of Rule XVI, Section 3, that "At the expiration of a leave of absence the employee shall report for duty and shall thereupon be returned to the position filled by him when such leave was granted; *the employee shall have the right at any time within the period of leave to return to work.*" (Appellant's italics.) It is sufficient answer to this contention to say that the employee's right to return to work is not an unqualified one, and the Civil Service Rules and Regulations must be read and considered in their entirety and not a single phrase considered by itself. Nor does the rule requiring a physical examination "automatically" disqualify the appellant from resuming employment; on the contrary the right of appeal to the Civil Service Board fully protects the appellant's rights, and the trial court found "that under the provisions of Sec. 106 of the Charter of the City of Long Beach the petitioner is entitler to a hearing before the Civil Service Board". It is to be further noted that the judgment merely denied appellant's petition for a peremptory writ of mandate "without prejudice to the petitioner to file another petition subsequent to a hearing before the Civil Service Board."

None of the cases cited are directly helpful in the present controversy; such cases either deal with generalities about which there is no disagreement, or the factual situation is dissimilar to that in the instant case. The case of Lotts v. Board of Park Commissioners, 13 Cal.App.2d 625, 57 P.2d 215, cited by appellant as presenting an analogous situation, involved a petition to compel the Board to reinstate petitioners to full time positions where the City Council had adopted an ordinance permitting the creation of "half time positions". Mandamus was there held a proper remedy where petitioners had been arbitrarily displaced without conformity with charter provisions governing removal. The Lotts case bears no resemblance to the present situation and is not authority for appellant's contentions. No arbitrary discharge or displacement occurred in respect to appellant's position; nor was there any disregard of relevant charter provisions.

[3] It is further argued that, in any event, appellant had not been "absent from duty" more than six months prior to July 16, 1945 at which time he actually reported for duty. The theory of this contention is that neither appellant's sick leave nor the vacation absence which preceded the final six months leave of absence, can rightfully be considered as absence from duty requiring appellant to submit to the physical examination specified in Section 13 of Rule V. It appears from Paragraph VI of the Findings of Fact that appellant was entitled to be "carried on the payroll of said department for the period * * * between December 24, 1944 and January 23, 1945" by reason of sick leave and regular vacation. In this connection attention is called to Civil Service Rule X relating to promotions, defining "active service" as the time "during which the employee is carried on the payroll in the position from which promotion is sought". Obviously this section, dealing only with promotions, cannot be extended to cover the present situation.

[4, 5] It is further submitted that under Police Directive No. 7.33, all members of the department are placed on active duty in the event of an emergency whether on vacation or not; hence that appellant's vacation period was not technically "absence from duty". Appellant also complains that the trial court erred in excluding this police directive from evidence. Captain Faulkner of the Police Department had testified in respect to the directive, and as mentioned in respondent's brief, there was no showing that appellant would have been physically able to comply with such directive had he been required to report for duty in an emergency. No error is here apparent. The same may be said in respect to appellant's assignment that the trial court erred in rejecting evidence to the effect that Captain Faulkner had advised Patrolman English that the latter could return at any time within the six months' leave of absence without taking a physical examination. Neither on the theory of establishing an estoppel upon the part of the City, nor to show an alleged contemporaneous construction of the rules, was this evidence admissible. It cannot be seriously contended that Captain Faulkner's statements could change the explicit provisions of the rule; nor should such statements be considered either as effecting an estoppel, or as establishing contemporaneous construction of a provision which, by reason of its clarity, needed no construction.

[6] Unfortunately for appellant's contentions, the terminology of Section 13, Rule V is precise and comprehensive. This rule requires that "If an employee in the classified service has been absent from duty *for any reason* for a period of six (6) months or more, he shall be required to submit to and pass the physical examination". (Italics added.) Such provision makes no exception in cases involving sick leave, vacation, or otherwise; obviously no such qualification can be read into the rule. Appellant's entire, continous absence from duty was from December 24, 1944 until July 16, 1945,—"a period of six months or more", and the italicized words "for any reason" must be held to bring appellant within purview of the rule requiring the taking of a physical examination. The appellant's arguments to the contrary are not persuasive.

[7] In view of the fact that the appellant patrolman reported for duty on July 16, 1945, and that no written charges of any kind were served upon appellant until August 3, 1945 and after the filing of appellant's petition for writ of mandate, the appellant is entitled to receive compensation from the City of Long Beach during said period. The judgment of the trial court is therefore modified to direct that the respondent city shall forthwith pay the appellant's salary during the period from July 16, 1945 to August 3, 1945, and as so modified the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

77 Cal.App.2d 902

ROBINSON et al. v. CHAPMAN SQUARE, Inc.

Civ. 15369.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1947.

Corporations 🔑1

Corporation was not liable for breach of contract made by one, as agent of another, though both principal and agent became officers of corporation subsequently organized to develop the property involved.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by E. S. Robinson and A. J. Chapman, a partnership doing business as Contractors' Sheet Metal Works, against Chapman Square, Inc., a corporation, to recover damages for loss of profits. From a judgment for plaintiffs, defendant appeals.

Reversed.

Reynolds & Painter and Louis Miller, all of Los Angeles, for appellant.

Arthur J. Speight, of Los Angeles, for respondents.

WILSON, Justice.

Since the evidence is insufficient to sustain the basic finding of fact that plaintiffs and defendant entered into the several contracts therein described without which the judgment in favor of plaintiffs from which defendant has appealed cannot survive, the judgment must be reversed.

The action is to recover damages for loss of profits alleged to have been suffered by plaintiffs by reason of defendant's refusal to permit them to perform contracts for the installation of sheet metal work in a number of dwellings erected by defendant. Plaintiffs alleged and the court found that on or about January 24, 1944, contracts were entered into whereby they agreed to do the work and defendant agreed to pay stated prices therefor; that defendant renounced and repudiated its agreements, depriving plaintiffs of their anticipated profits.

One Jane Reed Kissinger owned two tracts of real property in Los Angeles County which, in the latter part of 1943, she was planning to subdivide and to develop for sale by erecting small dwellings thereon. One tract was known as the Pleasant Valley Tract, the other as Chapman Square. On December 1, 1943, Robinson, one of the plaintiff partners, visited Mrs. Kissinger's place of business to solicit orders for the sheet metal work to be installed in the buildings on her two tracts. Her agent, I. H. Brown, gave him several blueprints designated by plan and elevation numbers. The blueprints were not otherwise identified and contained no reference either to Pleasant Valley or to Chapman Square. From these blueprints Robinson made his estimates in duplicate on plaintiffs' printed forms for the sheet metal work required for the various buildings, referring to the plans by their respective numbers. The estimates did not state how many houses were to be constructed from each plan. His offers were dated December 1, 1943. Each offer was for work on "Building of Jane Reed Kissinger." He gave Mrs. Kissinger the copy of each estimate and retained the original. Robinson returned to Mrs. Kissinger's office on January 24, 1944, where he saw Brown, with whom he had previously conferred, and was introduced by him to G. R. Branch, whom Mrs. Kissinger had employed on January 9, 1944, as her building superintendent. Robinson brought with him on this occasion the originals of the estimates. Branch was authorized by Mrs. Kissinger to sign and he did sign an acceptance dated January 24, 1944, on each estimate, signing "G. R. Branch" without any designation as to whether he was acting as agent for any other person, and if so for whom. Defendant's name did not appear on any of the originals or copies of the estimates.

On the date on which the acceptances were signed articles of incorporation were filed in the office of the Secretary of State of both Pleasant Valley Homes, Inc. and

Chapman Square, Inc. The directors were the same in each corporation. Plaintiffs performed their contracts on the buildings in the Pleasant Valley Tract, comprising 87 homes, the work extending over the period from April to July, 1944, after which they received a letter from Chapman Square, Inc., signed by Mrs. Kissinger as president, notifying them that their services would not be required on the Chapman Square dwellings. It is for the loss of profit on the latter project that this action is prosecuted.

It is clear that there were no contracts between plaintiffs and defendant. The estimates or offers were made by plaintiffs to Mrs. Kissinger as an individual long before Chapman Square, Inc. was incorporated. In accepting the offers with Mrs. Kissinger's authority Branch must be deemed to have been acting as her agent. There is no evidence that he was authorized by defendant to sign the acceptances on its behalf, nor is there evidence from which an inference to that effect may be drawn. The fact that the acceptances were signed and the articles of incorporation of Chapman Square, Inc. were filed on the same day is not a controlling nor even a persuasive circumstance. Branch had become the employee of Mrs. Kissinger on January 9, 1944. His salary was paid by her for a short period of time, then by Pleasant Valley Homes, Inc. until July, 1944. When his service with the latter company ceased he went into the employ of defendant.

Upon the organization of the two corporations Mrs. Kissinger became president and Brown secretary of each. Later plaintiffs received by mail preference ratings or "priorities" from Pleasant Valley Homes, Inc. and Chapman Square, Inc., each signed by I. H. Brown, secretary. Each document authorized the purchase of galvanized iron and solder, materials necessary in the performance of the work covered by plaintiffs' estimates. While these facts and the fact that the Pleasant Valley work was completed and paid for may be considered as indicating Mrs. Kissinger's intention or expectation, at the time plaintiffs made their offers to perform the work, to incorporate the two companies and through them to erect the dwellings, they do not tend to create contracts between plaintiffs and defendant nor to establish liability of defendant for the loss, if any, suffered by plaintiffs.

Mrs. Kissinger's direction to Branch to sign the offers addressed to her created a liability against her, but since it is not contended that defendant corporation was her alter ego, her authorization to accept the offers did not bind defendant. The facts that Branch and Brown acted for Pleasant Valley Homes, Inc. and that the work in the Pleasant Valley Tract was completed and paid for by that corporation shows that it adopted and acted under the contracts between plaintiffs and Mrs. Kissinger pertaining to the homes erected in its subdivision; but there is no inference, as contended by plaintiffs, that defendant adopted the contracts with her that covered the buildings in Chapman Square.

Although the two corporations had the same officers and directors they were separate entities. There is no evidence that the shares of stock were held by the same persons or in the same proportion. The signing by Mrs. Kissinger of the so-called renunciation of the contracts relating to the last named tract was within her authority as president of defendant corporation. Having concluded that there were no contracts between the litigating parties and no liability on the part of defendant, we need not speculate as to Mrs. Kissinger's mental processes leading to the sending of the letter cancelling the contracts. Nor need we consider whether or not plaintiff should have sued Mrs. Kissinger on her personal liability under the contracts signed on her behalf by Branch.

Since there is no basis for an action against defendant the other assignments of error are removed from discussion.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

77 Cal.App.2d 786

VEGA AIRCRAFT CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15403.

District Court of Appeal, Second District, Division 3, California.

Jan. 27, 1947.

1. Workmen's compensation ⚷945

Alleged negligence of injured employee could not mitigate increased compensation allowed under the Workman's Compensation Act because of serious and willful misconduct of executive, managing officer, or general superintendent of corporate employer. Labor Code, §§ 3600, 4553.

2. Workmen's compensation ⚷1674

Evidence justified award of increased compensation for employer's serious and willful misconduct on ground that employee's injury, caused by rivet-set flying out of rivet-gun and striking employee in the face, was due to employer's failure to provide adequate safeguards, failure to instruct in and enforce full use of safeguards that were provided, and failure to exercise the caution of a prudent employer. Labor Code, §§ 3600, 4553, 6403.

◆

Workmen's compensation proceeding by Abe Elom Bowlin, employee opposed by Vega Aircraft Corporation, a corporation, employer, for personal injuries. The Industrial Accident Commission made an award of normal compensation and an additional award of one-half the normal compensation, and the employer petitions for writ of review.

Award affirmed.

Syril S. Tipton, of Los Angeles, for petitioner.

R. C. McKellips, of San Francisco, and Edward A. Sarkisian, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

On May 17, 1943, Abe Elom Bowlin, while working as a riveter for petitioner Vega Aircraft Corporation at Fresno, sustained an injury causing permanent partial disability consisting of the loss of his right eye. For this disability the Industrial Accident Commission held that he was entitled to normal compensation in the sum of $2,449.92 and assessed its award in that amount against Associated Indemnity Corporation, insurance carrier of Vega Aircraft Corporation, providing also for any medical treatment required to cure and relieve Bowlin from the effects of his injury, including the furnishing and placing of an artificial eye. At the same time the Commission made an additional award under section 4553 of the Labor Code in favor of Bowlin against Vega Aircraft Corporation in the sum of $1,224.96 (one-half of the normal compensation), holding in its findings that his injury was proximately caused by the serious and wilful misconduct of his employer.

Upon petition of Vega Aircraft Corporation we have reviewed this latter award and have concluded that it should stand. There is no dispute between the parties as to how the accident occurred. Bowlin, at the time, was working with his riveting partner, Raymond Hartman. These men alternated in their work as riveter and bucker and on the day of the injury were working upon a piece of machinery known as an aluminum wing journal. As one man drove rivets into this piece of machinery the other man held his bucking-bar against the reverse side in such a position as to cause the soft head of the rivet to spread and thereby become secure. When Hartman finished riveting from his side he started to pass the rivet-gun to Bowlin. Bowlin laid down his bucking-bar and reached under the table to receive the rivet-gun. While it was being passed the trigger caught on something and operated the mechanism which permitted an inrush of air to the gun. This caused the rivet-set to fly out and strike Bowlin in the face. He was wearing glasses at the time, the right lens was broken and pieces of glass entered his right eye causing the injury which subsequently necessitated enucleation of the eye. Only slight pressure was necessary to operate the rivet-gun. Its accidental operation could be prevented by means of a detachable coil spring fitting over the barrel of the gun. This spring is known as a safety-spring and in the operation of the petitioner's business is detached when returned to the tool-crib after each day's use and reissued as needed. Bowlin testified that on the morning of the day that he was injured he asked for a safety spring at the tool-crib and was told that they were on order but none had been received and none were available. He had been using the rivet-gun for about three weeks and during that time had never had a safety-spring although he had asked for one at the tool-crib on several occasions, each time being told that the springs were on order but that none were available, the order not having been filled.

Petitioner contends that Bowlin could have prevented the accidental operation of the gun if he had used a rubber band in place of the safety-spring or had held his hand over the barrel hole of the gun. Certain witnesses produced by the petitioner testified that during a two weeks' instruction course given by Vega Aircraft Corporation, the employees, including Bowlin, were instructed to use these precautions when a safety-spring was not available. Bowlin, however, denied that he had ever been told of these alternative safety measures. Hartman testified that he had not presented a requisition for a safety-spring, never having received instructions as to operating a riveting-set without one; further, that he had never received instructions concerning the use of rubber bands to hold the riveting-set in place. The group leader of these men, one McClintock, testified that on the day of the accident they had no retaining spring; that Bowlin had asked him if any had arrived; that previously under instructions of Odell, the supervisor, he had advised Bowlin and Hartman that there was danger, "These A V 13 guns very easily trip the trigger," and had told them to remove the rivet-set when they were not using the rivet-gun. This rivet-set is described as a piece of steel, shaped like a twenty-two bullet and used, according to our understanding, for driving home the rivets. Mr. McClintock further testified that at no time during the month of May, 1943, when Bowlin was a member of his group, did he ever see any of the rivet-guns operated with rubber retainers; that before Bowlin's injury he, McClintock, had never heard of one, had never received any instructions or issued any with reference to them.

The defendants produced as a witness a Mr. Hatton, who testified that he was Chief Safety Engineer of the Lockheed Vega Aircraft Corporation and, as such, had occasionally demonstrated a hand-riveting gun when he had no spring and in lieu thereof used a rubber band. He stated that with the rubber band in place "[T]he set attempts to leave the gun. It does leave the gun for about an inch and then the resiliency of the rubber begins to take place and prevents the set from flying, and the set merely goes out of the gun and flops underneath the gun.

"Q. In May, 1943 what was the situation insofar as these set springs were concerned in the Lockheed plant? A. Well, at that time we were in the midst of a very heavy aviation program and this plant was one of them, and we were having difficulty at that time in obtaining an adequate supply of these springs, due to the critical shortage of these materials.

"Q. What was the purpose of the rubber band? A. The purpose of the rubber was to make the operation safe in the absence of the springs.

"Q. Since you could not get the springs? A. That is right."

Inquiry was made of this witness concerning the use of plastic face-shields such as Bowlin wore at the time of his injury. He stated that his employer published and circulated a booklet of safety rules covering the use of face-shields, specifically outlining various functions in which eye protection should be used.

"Q. With reference to flying metal? A. Flying objects.

"Q. Such as grinding operations? A. That is correct.

"Q. Normally in a riveting operation there is no flying object, is there? A. Normally no."

Bowlin testified that he was never furnished with the safety booklet or a book of safety rules; that he did not read one which his wife, also an employee of Vega, testified she picked up to read when they were passed around "after my husband got hurt * * * it said to always wear goggles or face shield in drilling or filing where there are pieces of small nature." In his statement before the referee, Bowlin testified that the face-shield which he wore was over his face and down over his eyes.

"Q. And did this trigger go through the face shield? A. No, sir, it didn't.

"Q. Then how did it hit your eye? A. It knocked it off my head when it hit my glasses. I had my glasses on, that plunger hit me in the face shield, breaking my glasses in my eye.

"Q. Did not break the face shield? A. No, sir.

"Q. Did not mark it at all? A. I don't know whether it did. I didn't go to see it.

"Q. As a matter of fact, that face shield was up when this accident occurred, wasn't it? A. No, sir. it wasn't.

"Q. You told the nurse that it was up right after the accident? A. I don't think I did."

The industrial nurse testified that she talked to Bowlin immediately after the accident. "I asked him if he had his shield on and he said yes, he had it on, but it was up." According to the witness Hatton, this shield was made of plastic so strong that it would not break upon a rivet-set striking it. Hartman, Bowlin's drilling partner, was asked "If Mr. Bowlin was wearing a rivet mask at the time of the injury, was that mask in position over his face, or was it in a raised position?" and answered, "Raised over his head. We weren't required to have them in position except when drilling or rodding or filing." McClintock testified that before Bowlin's accident he had not seen rubber bands used in connection with the operation of the air-gun; that he gave no instructions to anyone working under him with regard to the use of such bands, and that at no time did he receive any instructions from anyone with respect to the use of such rubber substitute for a safety-spring. One of the petitioner's witnesses, Richard Kelley, conducted the instruction classes for new employees and while he testified that he told the workers that they were to use a rubber-band when a spring was not available, he testified that he had never heard Hubbard, who was in charge of the tool-crib, advise anybody that a supply of rubber bands was available for use as substitutes for the safety springs. He had, however, heard Hubbard advise men that the safety springs were on order but had not been received. There was no showing as to when the order for the safety springs was placed, nor of any diligence on the part of the employer to obtain the springs either from the source ordered or some other.

In the Findings of Fact made by the Industrial Accident Commission, based upon the report of the referee, serious and wilful misconduct on the part of the employer was found to have existed (a) by failure to provide Bowlin with an adequate safeguard to prevent rivet-sets from flying out of the rivet-gun, (b) from failing to instruct in, and to enforce, at all times while handling rivet-guns, the full use of safeguards that were provided, (c) that the employer, through its executives, managing officers and general superintendents, knowingly and wilfully failed and neglected to exercise the caution which a prudent employer would have exercised in preventing the ejection of rivet-sets at times when the nozzle of the rivet-gun could not be held against a stationary object.

[1] It is apparent from these findings that the Commission did not adopt the view urged by petitioner that Bowlin's injury was caused by his failure to wear his mask in a position to protect his eyes. The argument that he was careless in that regard might be considered sufficiently refuted by the evidence that eye protection was to be secured only when work such as filing or grinding was under way, when small particles were flying in the air or when the work was such that flying objects were normally to be expected. But petitioner concedes, as he must in view of the language used in section 3600, Labor Code, that contributory negligence is not a defense to a compensation claim and in our opinion if Bowlin's actions or failure to act constituted negligence that cannot serve

so far as his employer's misconduct is concerned "to mitigate the authorized severities of the law."

[2] As a final protest against the claimed unfairness of the award, counsel for petitioner calls our attention to that portion of section 4553, Labor Code, which provides for increased compensation "where the employee is injured by reason of the serious and wilful misconduct of any of the following: * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof." He declares that "there was no evidence whatever in the case at bar that the alleged wilful misconduct, assuming but not conceding that there was such, was either committed by or acquiesced in by an executive, managing officer or general superintendent," and argues that under the reasoning of Bechtel, etc., Corp. v. Industrial Acc. Comm., 1944, 25 Cal.2d 171, 153 P.2d 331, the Commission should have rejected Bowlin's claim for the increased compensation. But on the facts of this case, we take a contrary view, having in mind particularly sections 6401 and 6403 of the Labor Code. The latter section provides that: "No employer shall fail or neglect: (a) [*Safety devices and safeguards.*] To provide and use safety devices and safeguards. (b) [*Adequate methods and processes.*] To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. (c) [*Other things.*] To do every other thing reasonably necessary to protect the life and safety of employees." In the instant case we note that Mr. McClintock, Bowlin's group leader, under instructions received from Odell, "the supervisor," had told Bowlin and Hartman to remove the rivet-set when their rivet-gun was not in use, but he, McClintock, failed to tell them to use the rubber-band substitute for the safety spring. He stated that he never saw one used while Bowlin was working under him, had never heard of one, or received any instructions from Odell or anyone else concerning them, nor had he issued any instructions with reference to them. Mr. Hatton, however, was very familiar with the rubber band substitute, knew their purpose "was to make the operation safe in the absence of the springs" and testified that "they have always been used in the aircraft business." Yet although he was the chief safety engineer of the plant where Bowlin worked he failed, so far as the record discloses, to do a number of things that might be considered "reasonably necessary to protect" the safety of employees there employed, as required by subsection (c), section 6403, Labor Code, supra. He might have told Clifford Hubbard, who was in charge of the tool-crib, never to issue a rivet-gun without a rubber band as substitute for a safety spring, or he might have directed Hubbard to offer a rubber band to every man applying for a safety spring when none were available. There is nothing in the record to indicate that he ever took such steps, but we do know that Mr. Kelley testified that he never heard Hubbard advise the men who applied for safety springs that there was on hand a supply of rubber bands. Another instance which indicates a lack of proper interest in the employee's protection is the circumstance that he never received a booklet with safety rules, nor was there any showing that the booklet which Mrs. Bowlin picked up after her husband's accident made any reference to the use of a rubber band as a safety device on a rivet-gun in lieu of a missing safety spring.

The referee who heard the testimony in this case and visited the plant where the accident occurred indicated in her report her reliance upon E. Clemens Horst Co. v. Industrial Acc. Comm., 1920, 184 Cal. 180, 193 P. 105, 16 A.L.R. 611. In that case, at page 183 of 184 Cal., at page 106 of 193 P., we find the following statement: "The commission has found on this point: '(8) That at the time of said injury, the employer was a corporation. That the employer by its executive and managing officers constructed said plant and placed therein the transmission shafting upon which applicant was injured. * * *'" In the instant case the Commission made a finding that "At the time of the injury to the employee the employer, through its executives, managing officers and general superintendents, knowingly and wilfully failed and refused and neglected to provide said employee * * * an adequate safeguard to prevent rivet sets from flying out of the rivet gun * * * failed to instruct in, and to enforce, the full use of, at all times while handling riveting guns, safeguards that were provided * * * failed and neglected to exercise the caution which a prudent employer would have exercised in preventing the ejection of rivet sets * * *." It will be noted that in neither case does the Commission mention the individual primarily responsible for the failure to adopt and use the proper safeguards, but in the cited case the court asserted that "it is plain that Conrad was a managing officer of the petitioner, for whose wilful misconduct the company is responsible," while in the case before us the referee, upon whose report the Commission based the award, made a finding that "The safety engineer was general superintendent for the employer" and "[T]he failure to furnish substitute safeguards and to give and enforce definite and specific orders with respect to using such substitute and other safeguards while handling rivet guns constitutes serious and wilful misconduct of a general superintendent and therefore of the employer." While Mr. Hatton presumably was not the general superintendent in charge of construction, it clearly appears that as to the adoption and use of safety measures and devices he had the power and the duty which attach to general superintendence.

The award is affirmed.

WOOD, J., concurs.

SHINN, Justice.

I concur in the judgment. It would have been serious and wilful misconduct on the part of the employer to fail to provide safety springs for use on the rivet guns when springs were available. It was equally necessary to provide rubber bands when springs were not available. The evidence that rubber bands were provided during the period when there were no springs on hand was uncertain and unsatisfactory, consisting of the testimony of Mr. Kelley, the class instructor, who testified that there were rubber bands in the tool crib "because we were using them in the class room," and the testimony of Katherine L. Rockas that she had obtained rubber bands at the tool crib many times. The tool department manager was Charles Lucas. The employee in charge of issuing and collecting tools was Clifford Hubbard, who was still employed at the plant at the time of the hearing. Mr. Kelley testified that about the date of the accident he had heard employees ask Hubbard for springs and that Hubbard had replied that they were unable to furnish them but had not told the employees that he had rubber bands. Neither Lucas nor Hubbard was called as a witness, although they were the ones who would have been in the best position to testify upon the critical point in issue, namely, whether the employer issued to the employees rubber bands when no springs were on hand. The failure to call these witnesses warranted an inference that their testimony on the point would have been adverse to the employer. It was a justifiable inference from the evidence as a whole that the employer failed to furnish rubber bands, which had been commonly used in the industry for many years as a safety device.

The Referee found that although Bowlin had the safety mask on his head at the time of the accident, it was shoved up so that it did not protect his eyes. This was the only reasonable conclusion to be drawn from the evidence. It was shown by demonstrations to the Referee that the rivet set, which was of tempered steel about three-eighths of an inch thick and three or four inches long, when shot against the safety shield did not break it, depress it, or even scratch the surface of it. The shield would have protected Bowlin from eye injury if he had had it over his eyes.

Petitioner argues from this state of facts that the proximate cause of the accident was the failure of Bowlin to wear the shield over his face, and not the absence of a spring or rubber band. We assume that he contends that it was the sole proximate cause. Petitioner does not question the award of compensation upon this ground, but only the additional award for serious and wilful misconduct, although if the point were well taken as to one, it would be as to both, and the entire award would be erroneous. But it is not well taken. There were two proximate causes of the accident, the absence of a spring or rubber band and the improper wearing of the shield, but both were related to the employment, the injury was proximately caused by the employment, it was not caused by the intoxication of the employee, was not intentionally self-inflicted, and therefore, under section 3600 of the Labor Code, the employer was liable for the payment of compensation. If it is the petitioner's contention that serious and wilful misconduct of an employer bearing no causal relation to the injury will not justify an increased award, he poses a question which is not involved in this proceeding.

77 Cal.App.2d 877

In re McDANIEL'S ESTATE.

MORRELL et al. v. SEUIS.

Civ. 3535.

District Court of Appeal, Fourth District, California.

Feb. 3, 1947.

1. Wills 🔑326

Where will was contested because of alleged unsound mind of testatrix and because of alleged undue influence, motion for nonsuit on the grounds that contestants "failed utterly to make out any case" or to prove any material allegations necessary to establish undue influence, together with ruling sustaining motion and instruction to jury that motion had been sustained, indicated that ruling included both grounds of contest and not merely the ground of undue influence.

2. Wills 🔑384

Where several causes of will contest are alleged and plaintiffs totally fail to make out a case on grounds alleged and defect is incurable and there is no evidence which will support a favorable finding on any ground, error in sustaining a motion for nonsuit, when grounds of motion are not stated and motion does not show wherein plaintiffs failed to prove their case, is not prejudicial.

3. Appeal and error 🔑927(3)

On review of a judgment of nonsuit, court will indulge in every legitimate inference favorable to plaintiff, disregard conflicting testimony, and view it in its most favorable aspect to determine whether evidence was substantially sufficient to support a verdict in plaintiff's favor.

4. Wills 🔑326

In will contest on the ground of unsoundness of testatrix' mind and on the ground of undue influence, judgment of a nonsuit was authorized.

5. Wills 🔑164(1)

Evidence that will was made nearly a year prior to testatrix' death, so that she had plenty of time to reflect upon any change in it she may have desired, and evidence that she had independent legal advice, may be considered as weighing against charge of undue influence.

6. Wills 🔑164(1)

Evidence of executor's arrest and conduct with testatrix some five to six years before will was executed, was too remote to add any weight to question of undue influence at time of making of will.

7. Wills 🔑155(1)

The "undue influence" which will invalidate a will must be such as destroys free agency and constrains testatrix, at time will is made, to make a disposition of her estate contrary to that which she would have done if she had been left to the free exercise of her own judgment, and such influence must operate upon the very act of execution of will and will must be the product of such influence.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

8. Wills 🔑1

The right of absolute dominion over one's property is inviolable and, whatever may be one's motives in making disposition of his property by will, his will in the disposition of that property is paramount.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding in the matter of the estate of Mildred Babe McDaniel, deceased, wherein Gertrude Marie Morrell and others contested decedent's will after probate, which contest was resisted by Jimmie Seuis, also known as J. K. Seuis, individually and as executor of decedent's estate. From a judgment of nonsuit, contestants appeal.

Affirmed.

Max B. Jamison, of Porterville, for appellants.

H. S. Millspaugh, of Lindsay, and Gaylord N. Hubler, of Porterville, for respondent.

GRIFFIN, Justice.

The holographic will of Mrs. Mildred Babe McDaniel, a widow, deceased, dated January 29, 1944, was admitted to probate on February 13, 1945. The will recited that she first directed the payment of her just debts. Then she bequeathed her residence, including all furniture therein, and $1,000 to J. W. Seuis; $300 to a Mrs. Fleharty, and the residue went to her named sisters. Seuis was nominated executor to act without bond. The petition to probate the will alleged her property to be of the approximate value of $5,000. Mrs. Morrell, a sister of deceased, and one of the devisees herein, testified that the house and furniture was bequeathed to the five daughters by their mother, and that Mrs. McDaniel purchased all of the interests except Mrs. Morrell's.

The amended petition contesting the will after probate, alleges that the will should be revoked on two grounds: (1) That Mrs. McDaniel was not, at the time of its execution, of sound and disposing mind; (2) that she was then "acting wholly under the influence and duress of Jimmie Seuis." These allegations were denied generally by defendant. A jury trial was demanded. After plaintiffs had produced all their evidence, counsel for defendant moved for a nonsuit in the following language:

"* * * the respondent moves the court for a nonsuit on the grounds that the contestants have failed utterly to make out any case or to prove any material allegations required to prove—the case of undue influence warranting the invalidation of a will."

The trial judge, in the absence of the jury, orally reviewed the evidence produced by plaintiffs and at the conclusion thereof he stated:

"There is absolutely no evidence upon what occurred at the time of her executing this will * * * there is absolutely no evidence as to any mental upset other than agitation and nervousness—no loss of mental facilities; in fact, she lived a year after the will was executed * * *. As Mr. Seuis said, he never saw the will until he saw it in Mr. Millspaugh's office, and there is no testimony or anything to show that he dominated her, or exercised an undue control over her power of volition at the time the will was executed. For these reasons, I think that the motion for a nonsuit must be granted, and it is so ordered. Mr. Bailiff, call in the jury."

He then told the jury:

"* * * the court has just made a ruling which means you may take a longer adjournment. It has granted a motion for a nonsuit because of the fact that the court thinks there has been no testimony presented which shows a control of the volition of the decedent—the testatrix at the time she executed her will more than a year before she died. For that reason, this motion for a nonsuit has been granted, and the court is of the opinion that there has not been a proper showing, or any showing of undue influence at the time the testatrix actually performed the testamentary act, so there will be no longer any necessity for you to hear anymore of the evidence."

Plaintiffs now claim (1) that the motion for nonsuit was not sufficient in form because it was directed only to plaintiffs' second cause of action, i.e. undue influence, and did not mention the first cause of action, i.e., unsound mind, and argue that it is error to grant a motion for nonsuit when the grounds thereof are not stated, where several causes of action are stated; and that the motion must show wherein plaintiffs failed to prove their case. Citing 9

Cal.Jur. p. 548, sec. 33, and such cases as Scott v. Sciaroni, 66 Cal.App. 577, 226 P. 827; Masero v. Bessolo, 87 Cal.App. 262, 262 P. 61; and Dawson v. Tulare Union High School, 98 Cal.App. 138, 276 P. 424.

It is contended that under the foregoing decisions they are entitled to a reversal of the judgment of nonsuit as far as it pertains to the first cause of action because that ground (unsound mind) was not included in the motion.

Counsel for defendant concedes the general rule set forth in 9 Cal.Jur. p. 548, § 33, but cites the exception set down to the general rule in Re Estate of Higgins, 156 Cal. 257, 104 P. 6, and followed in Gursky v. Rosenberg, 105 Cal.App. 410, 287 P. 575.

[1] From a mere reading of the motion, ruling, and instruction to the jury, it appears to us that there was little doubt, if any, in the mind of counsel for plaintiffs that the ruling included both claimed grounds specified in the amended petition. The grounds stated and rulings thereon were equivalent to a statement by the trial judge that the plaintiff had failed to prove a single allegation of his grounds of contest. See Carter, Administrator, v. Hopkins, 79 Cal. 82, 21 P. 549, 551, where it was said:

"The grounds on which the nonsuit was asked were sufficiently stated. They are equivalent to the statement that the plaintiff had failed to prove a single allegation of his complaint. The plaintiff's attorney no doubt understood what was meant by the attorney for the defendants, viz., that the plaintiff had not proved a single material allegation of the complaint. We cannot say that the nonsuit was erroneously granted for the reason that the grounds on which it was asked were not stated with the precision and definiteness that the law required." See, also, Johnson, Administrator, v. Southern California Edison Company, 27 Cal.App. 425, 150 P. 656.

[2] Even assuming that there is merit to plaintiffs' technical argument, the action of the trial court is without prejudice where plaintiffs have totally failed to make out a case on the grounds alleged and the defect is incurable, and where there is no evidence which would support a favorable finding on that ground. Ford v. Evans, 29 Cal.App.2d 623, 85 P.2d 214; Gursky v. Rosenberg, supra; In re Estate of Higgins, supra.

[3, 4] We will therefore consider this question along with the question whether the evidence produced upon the material points to be proved, indulging in every legitimate inference, disregarding conflicting testimony, and viewing it in its most favorable aspect, was substantially sufficient to support a verdict in plaintiffs' favor. Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; 9 Cal.Jur. p. 554, § 36. Counsel for plaintiffs does not set out in his brief, nor refer us to any substantial evidence that would support a judgment in plaintiffs' favor. Mountain Tunnel Gravel Mining Co. v. Bryan, 111 Cal. 36, 43 P. 410. However, we have read the entire record and have come to the same conclusion reached by the trial court.

We will recite a brief resume of the evidence. Mr. Seuis was called under section 2055 of the Code of Civil Procedure and testified generally that he first met Mrs. McDaniel, referred to as "Babe," in 1936 in San Francisco; that she lived at Lindsay; that she weighed about 165 pounds, was 5 ft. 3 inches tall and about 40 years of age; that she had the use of one eye only and had been employed as a telephone operator for nearly 20 years; that he was at that time separated from his wife; that he came to Lindsay to live in September, 1937; that he was unable to work and resided for three months at the home of Mrs. Hershberger, mother of Babe; that he moved out of those premises and worked around at several places as a bartender; that his wife divorced him and the decree became final in May, 1937; that Mrs. Hershberger died in December, 1938; that he and Mrs. McDaniel planned on being married; that he gave her what he earned; that Mrs. Morrell, sister of Babe, was living at Babe's home; that Mrs. Morrell had him arrested "about taking a stove" but that he did not take it and that he and Babe went down and told the judge what happened and there was no charge made; that he stayed away from the home for a while; that the other sisters told him he could go back and that "if Babe couldn't have her boy friends, neither could Mrs.

Morrell"; that Babe had a safe deposit box in her own name; that she was taken ill and although she was nervous and upset, her mental condition was "as sound as anyone"; that on January 15, 1944, the doctor informed her she had cancer. About January 29, 1944, she wrote the will here in question. He then testified that he remained in her home and cared for her until she was taken to the hospital; that he did not have access to her safe deposit box; that he never talked to her about making a will and that on January 26, 1945, nearly one year after making the will, Mrs. McDaniel died in the hospital; that he was not present; that a few days before her death she had him take some papers she had at the hospital to her attorney, Mr. Millspaugh.

A Mr. Matthewson testified that he visited in the home of deceased about January 30, 1944, about the date of making the will, and that Babe was "awful unrestful"; that she told him she had cancer; that Seuis was present and had an argument with Babe about a cooler; that later in the hospital, about a week before her death, he had a conversation with Seuis and he stated to him that he (Seuis) wanted to marry Babe but she wouldn't do it.

Mrs. Blanch Holmes testified that she knew all of the parties mentioned; that about January 8, 1939, she visited the home and Babe had bruises on her neck; that she asked her how it happened and she remarked "a friend of hers gave it to her," and she (Mrs. Holmes) remarked: "I would sure stand that guy on his ear," and she said: "Not if you were in my shoes you wouldn't"; that Mr. Seuis was very attentive around Babe; that after Babe found that she had cancer she was very "nervous—very upset—she couldn't keep her mind off of it, which was natural, I guess."

Gertrude Morrell testified that she was called to Lindsay on December 24, 1938, and had lived with Babe ever since; that Seuis came to live with Babe and her mother in August, 1937, and at the request of her mother he left in November of that year because she did not want to support him; that he did not live there again until February 28, 1944, but was "in and out a lot"; that her sister worked up until the day the doctor told her of her condition, and that her health was "very poorly" and continued so until her death; that on January 30, 1944, Babe called her at Antioch about the doctor's report of cancer and discussed with her whether she should have an operation or take radium; that on her return to Lindsay Babe was "very excitable"; that she would start to say something and she would not finish the conversation; that she would say: "I don't know what I want to do. I don't know whether I want to do that or not"; that she "didn't sleep very good" and had taken medicine for that; that in December, 1938, three weeks after the death of the mother, Seuis came to the home and after one hour "Babe came through the hall, screaming, and said 'Gertrude—Gertrude—' Jimmie was there and he wouldn't go home"; that he had choked her and tried to force her to marry him; that she, Mrs. Morrell, had Seuis arrested and the judge told Seuis not to come to the house "for a long time"; that he came anyway when she was away; that Seuis would "dominate over her and she seemed to do whatever he said or suggested"; that on January 29, 1944, in her opinion, Babe was not "in any condition of mind to make a will * * * she was too excited * * * very highly nervous"; that on January 31, 1944, she called Mr. Millspaugh to locate Babe and she was there consulting with him about making a will; that Babe told her that evening at home that she had made a will and that nobody else was with her that evening. Plaintiffs then offered in evidence, over objection, a certified copy of the Justice's Court docket in reference to the charge made against Seuis by Mrs. Morrell. Although it shows a plea of guilty to the charge of disturbing the peace and remission of a $25 fine conditioned that Seuis remain away from the Hershberger home for 3 months, it adds no force to the evidence already received on the subject.

At the conclusion of this evidence counsel for plaintiff announced: "That is all the testimony" and rested his case. The court then granted the motion for nonsuit.

[5] It can be readily observed that there was no evidence that would support a verdict that Mrs. McDaniel was of *unsound mind* at the time she made her will. In fact, all of the evidence indicates otherwise. Plaintiff does not argue that question in his brief. The evidence bearing on the question of duress or undue influence of Seuis upon Mrs. McDaniel, in making her will, if any, is purely a matter of conjecture, very slight, and falls far short of being that substantial evidence necessary to support a verdict in favor of plaintiffs. It does not affirmatively appear that the actions and conduct of Seuis, in relation to the will, was such as would convince any reasonable person that the will, as prepared, was not the will of the deceased and as she intended it to be, or that Seuis coerced her to execute it and thereby substitute his will for the will of the deceased, as alleged. The will was made nearly one year prior to her death. She had plenty of time to reflect upon any change in it she may have desired. She apparently had independent legal advice and the will is couched in legal form. All of immediate relatives were remembered in the will, but maybe not to the extent they had probably contemplated. There is no evidence that defendant ever knew Babe was making a will or had made a will until the will was turned over to him in the attorney's office after her death. While there may have been plans for their marriage, there was no evidence that would establish a confidential relationship sufficient to create any presumption of undue influence and that the beneficiary unduly profited by the will and actually participated in procuring its execution. In re Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77. The case of Azevedo v. Leavitt, 76 Cal.App.2d 321, 172 P.2d 704, has no application to the facts related in the instant case.

[6, 7] The evidence of defendant's arrest and conduct in 1938, or January, 1939, if material or competent, was too remote to add any weight to the question of undue influence at the time of the making of the will in 1944. The undue influence invalidating a will must be such as destroys free agency, constraining the testator at the time the will is made to make a disposition of her estate contrary to and different from that which she would have done if she had been left to the free exercise of her own inclination or judgment. An undue influence which will affect a testamentary act must be such influence operating upon the very act itself; an influence exerted and used prior to or at the time of the making of the will and of which the will is the product. In re Estate of Ricks, 160 Cal. 450, 117 P. 532.

In Re Kaufman's Estate, 117 Cal. 288, at page 295, 49 P. 192, at page 194, 59 Am.St.Rep. 179, it is said:

"The undue influence which will avoid a will must be such as operates upon the mind of the testator at the time of making the will, and must be an influence *relating to the will itself.*" And quoting from another case (Eckert v. Flowry, 43 Pa. 46], said: "Unless there was some evidence tending legitimately to prove that some fraud had been practiced upon the testatrix at that time, or that some misrepresentation had then been made, or that some physical or moral coercion had been employed, such as to destroy her free agency, the court erred in submitting to the jury the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law, as well as reason, presumed had no existence."

[8] The right of absolute dominion over one's property is sacred and inviolable, and whatever may be one's motives in making disposition of his property by will, his will in the disposition of that property is paramount. Clapp v. Fullerton, 34 N.Y. 190, 90 Am.Dec. 681. See also, In re Estate of King, 63 Cal.App.2d 365, 146 P.2d 952; In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25. The order granting the nonsuit was proper.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

78 Cal.App.2d 58

MITCHEL et al. v. BROWN et al.

Civ. 3513.

District Court of Appeal, Fourth District, California.

Feb. 10, 1947.

1. Appeal and error ⇨1212(1)

Where construction placed on deed by appellate court on former appeal was based on facts that account of complaint had been abandoned, that no evidence had been received other than the deed and that construction of deed was itself a matter of law and judgment was reversed generally, effect was to remand case for retrial on all issues as though it had never been tried, and case was left open for retrial on all of issues raised by pleadings with any amendment that might be made.

2. Evidence ⇨433(4)

Where grantees contended that quoted phrase in deed conveying 2½ per cent interest in minerals in "an undivided one-half of" tract was inserted by mistake and that grantees were entitled to 2½ per cent interest in minerals underlying entire tract, letters and other written instruments and oral testimony were admissible for purpose of showing actual intention of parties and whether quoted language was inserted as result of mutual mistake.

3. Quieting title ⇨50

Where only issue before trial court was construction to be given words of deed conveying interest in oil and gas underlying tract of land, grantees, under pleadings, regardless of whether they abandoned their prayer for reformation of deed, were entitled to have issue determined as to actual intention of parties and as to whether language inserted was placed there as result of mutual mistake and to have deed enforced in accordance with actual intent.

Appeal from Superior Court, Kern County; Warren L. Stockton, Judge.

Action by J. Burris Mitchel and another against Arthur Polk Brown also known as Arthur P. Brown and others to quiet title to right in minerals underlying a section of land. From a judgment for defendants, plaintiffs appeal.

Reversed.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

In 1936, the defendants Brown executed and delivered to the predecessor of the plaintiffs a mineral deed conveying to them 2½% of all oil and minerals underlying, or that might be produced from, described parcels of land in a certain section in Kern County. The only one of these parcels which is involved here was described in the typewritten deed as follows: "Parcel No. 5: the NW ¼ of said section 21". At the time the Browns executed this deed the words "an undivided ½ of" were inserted in ink before the word "Parcel".

The plaintiffs brought this action contending that they were entitled to 2½% of the oil and minerals underlying this entire quarter section and not merely that percentage of the oil and minerals underlying an undivided half of this land. The first count of the complaint sought to quiet their title to 2½% of the oil etc. in the entire quarter section. The second cause of action alleged, among other things, that at the time the deed was executed it was the intention of all parties thereto that 2½% of all oil etc. in the entire quarter section be conveyed; that in making this deed the grantors so described their title to the property as to limit the interest conveyed to 1¼% of the oil and minerals within the property; that the grantee accepted the deed under the mistaken belief that it conveyed, in accordance with the original intention of the parties, 2½% of the oil and minerals underlying the entire property; that this mistake of the grantee was known to, or suspected by, the grantors at the time the deed was made; and that, after demand made, the grantors had refused to correct the mistake. There was a third cause of action for declaratory relief.

The answer admitted that the plaintiffs were entitled to 2½% of the oil and minerals underlying an undivided one-half interest in this land, or an undivided 1¼% of such substances contained within the quarter section, but denied the other allegations referred to, and alleged that the intention of the parties at all times was that 2½% of the oil and minerals underlying an undivided one-half of the property was being conveyed.

At the first trial it was stipulated that the Browns owned only an undivided one-half interest in this quarter section, and the second cause of action was abandoned by the plaintiffs. No evidence was received other than the deed itself and the court construed the deed as conveying to the plaintiffs 2½% of the oil and minerals underlying the entire quarter section. On appeal, (Mitchel v. Brown, 43 Cal.App.2d 217, 110 P.2d 456) this court reversed the judgment that followed on the ground that, in the absence of other evidence, the only reasonable construction of the deed itself is that it conveyed a 2½% interest in the oil and minerals underlying an undivided one-half interest in the quarter section, and not covering the entire 160 acres.

On a retrial of the action the plaintiffs attempted to introduce evidence as to the real intention of the parties and, in support of the allegations of their complaint, they made an offer of proof including a number of letters and written instruments, as well as oral testimony. Among other things, they offered to prove that in 1934 the Browns had given them a similar deed, which described Parcel No. 5 as "the NW ¼ of said section 21" and which was recorded; that this deed did not contain the words "an undivided ½ of"; that it was later discovered that the permission of the Commissioner of Corporations would have to be secured; that in order to clear the record for this purpose the Browns wrote to the plaintiffs requesting a reconveyance of the property and promised to make a new deed identical in form with the old one; that the property was reconveyed and the new deed, the one here in question, was sent to the appellants with the words "an undivided ½ of" inserted before the words "Parcel No. 5"; that the plaintiffs were advised by counsel that the interlineation was intended to mean that the Browns owned only an undivided one-half interest in the property but did not mean that they were only conveying 1¼% of the oil; that the plaintiffs accepted the deed relying on former documents, correspondence and conversations; that the Browns later made a lease of this property in which a 2½% interest, as claimed by the plaintiffs, was recognized; that the Browns executed deeds to two other parties conveying interest in this land, in which the 2½% interest as contended for by these plaintiffs was recognized; and that in carrying out the provision of the deed in question which required these plaintiffs to pay their proportion of any tax which might be assessed upon the oil and minerals within this land the Browns, some months after the deed was given, demanded from the plaintiffs as their share of such taxes levied an amount which represents 2½% of the oil and minerals in the entire quarter section. They also offered to produce oral testimony of conversations and negotiations had for the purpose of showing the original intention of the parties.

Upon objection of the defendants all testimony of this nature was excluded. Although no such evidence was received, the court found that all allegations of the complaint with respect to the intention of the parties and the matter of a mistake were untrue, that all allegations of the answer with respect to the intention of the parties were true, and that the purpose and intention of the parties as stated and understood by them at the time was to transfer an undivided 1¼% of the oil and minerals contained within this quarter section. It was further found that at the beginning of the retrial of this action the plaintiffs had again abandoned any claim for the reformation of this deed. Judgment was entered accordingly, quieting title in the plaintiffs to an undivided 1¼% of all oil etc. underlying this quarter section and no more. From this judgment the plaintiffs have appealed.

The appeal is based on the contention that the evidence offered was admissible for the purpose of establishing the real intention of the parties to this deed. The respondents contend that this evidence was properly excluded under the parol evidence rule; because the construction placed on the deed by this court on the prior appeal had become the law of the case; and because the appellants were estopped, by the position they took at the prior trial and upon the former appeal, from relying on extrinsic evidence as an aid to the construction of the deed. It is further argued that on the retrial the appellants again abandoned their claim for reformation, and that the court so found.

[1] The construction placed on the deed by this court on the former appeal was based on the fact that the second count of the complaint had been abandoned, that no evidence had been received other than the deed, and that the construction of the deed itself was, under the circumstances, a matter of law. The judgment was reversed generally and the effect was to remand the case for a retrial on all issues, as though it had never been tried at all. In re Estate of Wear, 20 Cal.2d 124, 124 P.2d 12. The effect of that decision was to leave the case open for retrial on all of the issues raised by the pleadings, with any amendment that might be made.

[2] There is no evidence in the record to support the court's finding with respect to the issues in the pleadings, on which the case went to a retrial, relating to the matters of a mistake and the intention of the parties to this deed. The only evidence in the record sustaining the finding that the claim for a reformation was abandoned appears where the court was passing upon an objection to an amendment to the complaint. The court stated that he understood this amendment was offered not for the purpose of trying to obtain a reformation of the instrument but for the purpose of showing the meaning of the deed. Counsel for the appellants replied that this was correct. The court then stated that the motion to amend would be granted "for that purpose." While there may have been an abandonment of the claim for reformation in itself, nothing appears to support the contention that there was an abandonment of the allegations of intention and mistake contained in the second cause of action. The proposed amendment would have changed a few words in that cause of action but would not have destroyed its entire effect. Permission to amend for this purpose was granted but it does not appear that such an amendment was served or filed, and no amendment appears in the record. According to the record before us the case was tried on the issues raised by the allegations of the three causes of action in the complaint and the answer filed. The evidence offered was clearly material to those issues.

[3] Whether or not the appellants abandoned their prayer for the reformation of this deed they were entitled, under the pleadings, to have the issues determined as to the actual intention of the parties and as to whether the language inserted into the deed was placed there as a result of a mutual mistake, and to have the deed enforced in accordance with the actual intent. California Packing Corp. v. Larsen, 187 Cal. 610, 203 P. 102; Martin v. Stone, 15 Cal.App. 174, 113 P. 706; Bridges v. Price, 95 Cal.App. 394, 273 P. 72. Because of technical objections raised, first by one party and then by the other, this action has not yet been tried or decided on the issues raised by the pleadings. The evidence offered by the appellants is pertinent to the issues and seems substantial. Not only was this evidence erroneously rejected but findings to the contrary were made which are entirely without support in the evidence.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

77 Cal.App.2d 855

WEBSTER v. ZEVIN et al.

Civ. 15424.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1947.

Hearing Denied March 3, 1947.

Hearing Denied March 31, 1947.

1. Automobiles ⚿192(1)

Under statute rendering owner liable for injuries or death caused by automobile used by another with owner's express or implied permission, legislature intended to protect person who might be injured on public highway or upon private property as result of negligent operation of vehicles by persons other than owners who are operating vehicles with owner's permission. Vehicle Code, § 402.

2. Automobiles ⚿192(6)

The statute rendering owner liable for injuries or death caused by automobile used with owner's express or implied permission applied to owner whose automobile, which was borrowed for borrower's personal pleasure, after being parked in private club parking lot while driverless rolled down slope and injured a pedestrian on street. Vehicle Code, § 402.

◆

Appeal from Superior Court, Los Angeles County; Carol M. Sheldon, Judge.

Action by Mildred Bullers Webster against Esther Zevin and others to recover for death of plaintiff's minor son who was struck by an automobile which belonged to named defendant. From a judgment for plaintiff named defendant appeals.

Affirmed.

John M. Dvorin, of Los Angeles (Hoag & Mack, and A. F. Mack, Jr., all of Los Angeles, of counsel), for appellants.

John J. Wilson, Joseph Doyle and Albert E. Wheatcroft, all of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages for the death of her minor son, 18 years of age, as a result of being struck by an automobile.

The facts are not in controversy and may be thus epitomized: The automobile involved, a 1941 Hudson sedan, was owned by appellant Esther Zevin. Defendant Ralph F. Luria was a friend of appellant's husband who is not involved in this appeal. Appellant's husband usually drove and used his wife's vehicle. Mr. Luria arranged with said husband on the evening of October 15, 1943 to borrow the Hudson automobile for his own convenience and not for any purpose or business of appellant or her husband. After the automobile was delivered to him, Mr. Luria drove to the Clover Club, a restaurant and night club located at 8477 Sunset Boulevard in the county of Los Angeles, arriving there about 11:30 p. m. For the purpose of storing the automobiles of its patrons, the proprietors of the Clover Club maintained an automobile parking lot adjacent to the "club" building. The main entrance to the "club" was from the parking lot. Mr. Luria drove up the ramp on the "club" premises, continued on past the entrance and parked on the upper part of the parking lot on a slope or incline on the Clover Club property. Almost immediately after Mr. Luria parked the automobile and alighted therefrom, the driverless vehicle rolled down hill from the parking lot, along the driveway, past the entrance to the "club", and down toward Sunset Boulevard. On the night in question, plaintiff's son, who was standing at or near the entrance to the "club", was struck and fatally injured by the driverless vehicle.

Following trial, judgment was rendered in favor of plaintiff for $7,000 against defendant Luria, and for $5,000 against appellant owner of the automobile, under the statutory liability (Vehicle Code, sec. 402). From such judgment, appellant Esther Zevin alone appeals.

Respondent agrees that appellant correctly sets forth the question for determination on this appeal, when in her brief she states. "There is just one question for determination on this appeal without any ramifications or side issues whatever. It is this: Does section 402 of the Vehicle Code apply to impose liability upon the owner of an automobile for injuries or death resulting from its negligent operation by one to whom the automobile was lent solely for his own use and convenience, *where the accident occurs upon private property?*"

Appellant concedes that "the judgment of the trial court against appellant is correct if section 402 of the Vehicle Code applies, and it is in error if, as appellant contends, section 402 is not applicable to motor vehicle accidents occurring on private property."

In support of her contention that section 402 of the Vehicle Code does not apply to injuries or death resulting from negligent operation of a automobile by a borrower solely for his own use, where the accident occurs on private property, appellant urges that the Vehicle Code is concerned with the operation of vehicular traffic upon highways only. She directs our attention to section 31 of the Code which defines "vehicle" as a device by which any person or property may be propelled *upon a highway;* section 81, defining "street or Highway" as a way or place "publicly maintained and open to the use of the public" for purposes of vehicular travel; section 140, which makes it a misdemeanor for any person to drive a vehicle *upon any highway* unless such vehicle is registered as required by the Vehicle Code; section 250, making it unlawful for any person to drive a motor vehicle *upon a highway* unless possessed of a valid operator's or chauffeur's license; section 403, commonly referred to as "the guest law", which limits recovery by a guest to accidents occurring *upon a highway;* section 410, sometimes referred to as the "Financial Responsibility Law", which limits the judgment therein referred to as one obtained on account of death or bodily injury resulting from the operation by the judgment debtor of a motor vehicle *upon a highway.* By reason of the foregoing, appellant insists that the above provisions clearly demonstrate that the purpose and function of the Vehicle Code is the regulation of vehicular traffic upon the highways; that "what somebody does on private premises is not involved".

We are not in accord with appellant's contention nor the reasoning advanced in support thereof. The title of the Vehicle Code evidences no legislative intent to restrict its operation solely to vehicles upon the public highways alone. It reads, "An Act To Establish a Vehicle Code, Thereby Consolidating and Revising the Law Relating to Vehicles and Vehicular Traffic * * *". Had the legislature intended to confine the provisions of the Vehicle Code to public highways alone, manifestly the title would so declare.

Section 402 of the Vehicle Code now before us for interpretation, insofar as here pertinent, reads as follows:

> "Section 402. Liability of Private Owners.
>
> "(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

Had the legislature intended to limit the effect of an owner's liability to accidents occurring only on a public highway it undoubtedly would have used express language to that effect, as it did in the aforesaid sections cited by appellant, and as it did in section 352 of the Vehicle Code providing for the imputation to parents of a minor's negligence in certain cases. Furthermore, section 402 was lifted from our Civil Code. It is a redraft of section 1714¼ of the Civil Code and but for the consolidation of all laws relating to motor vehicles would yet be a part of the Civil Code. Were the section now a part of the Civil Code, appellant's contention would upon its face be untenable. Transplanting the section to the Vehicle Code without change in its terms furnishes no ground for an interpretation different from what would manifestly be given it as a Civil Code provision.

As we view the statute in question, the legislature in enacting it was not intent upon curing evils attendant upon the operation of motor vehicles upon the highways alone, but was concerned with the existing evil of unsatisfied judgments in borrowed automobile cases. By clear and understandable language, the lawmaking body imputes the negligence of the driver of a motor vehicle to its owner whenever the driver, at the time of the accident, is operating or using such vehicle with the permission, express or implied, of the owner, regardless of whether such driver is or is not on business for the owner. For a discussion of the conditions which existed at and prior to the passage in 1929 of what is now section 402 of the Vehicle Code, and the evils it was sought to remedy, see Bayless v. Mull, 50 Cal.App.2d 66, 69, 122 P.2d 608.

The case of Sylvester v. Brockway Motor Truck Corp., 232 App.Div. 364, 250 N.Y.S. 35, cited by appellant, and which dealt with an accident occurring on private property, is not helpful because the New York statute contains direct and positive language limiting its effect to accidents occurring on a public highway.

Appellant also relies upon the case of Burgess v. Cahill, 26 Cal.2d 320, at page 323, 158 P.2d 393, at page 394, 159 A.L.R. 1304, wherein the court uses this language: "The legislation was plainly intended to enlarge the liability of the nonculpable owner of a motor vehicle for its operation *on a public highway*". (Emphasis added.) This language does not aid appellant because when read in conjunction with its context it simply announces that, under the circumstances prevailing in that case, where the accident happened on a public highway, the negligence of the driver was imputed to the nonculpable owner. The case does not in any manner hold that such liability is restricted to accidents occurring on public highways. On the contrary, in stating the legislative purpose attendant upon the enactment of section 402 of the Vehicle Code, the court says: "A reading of the language of the statute and a review of the decisions in this state reveal that the legislative purpose in the enactment of section 1714¼ of the Civil Code (now section 402 of the Vehicle Code), was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The wording of the statute is clear and indicates that purpose. The statute defines the owner's liability in cases where the principle of *respondeat superior* is inapplicable, in order to make the owner liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car." (Citing cases).

[1, 2] We therefore hold that the legislative intent as expressly stated in the statute was to protect persons who might be injured either upon a public highway or upon private property as a result of the negligent operation of motor vehicles by persons other than the owners thereof, who are operating the same with the permission of such owners. Were we to hold otherwise we would be departing from the clear meaning of the language of the statute which is free from ambiguity. We would be required to rewrite a statute to accord with a presumed legislative intent. To write into the statute a limitation of its application to accidents occurring solely upon public highways and to thereby withhold its application from cases where injuries or death occur on private property would not be construction of the statute at all, but would amount to judicial legislation, and courts are without power to legislate.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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78 Cal.App.2d 1

ARTUKOVICH et al. v. PACIFIC STATES CAST IRON PIPE CO.

Civ. 15663.

District Court of Appeal, Second District, Division 2, California.
Feb. 5, 1947.

1. Appeal and error 🔑931(1)

Evidence must be viewed in light most favorable to respondent.

2. Evidence 🔑414

The date which an instrument bears is only presumptive evidence that instrument is truly dated, and actual date on which document is executed may be shown by evidence other than document itself.

3. Contracts 🔑175(3)

Where true date of instrument was in issue and instrument indicated that offer was made on May 29, and that acceptance was on May 25, testimony of witnesses that acceptance of contract by the signing thereof took place on May 29, was substantial evidence to sustain finding that contract was made on that date.

4. Corporations 🔑426(9)

Where corporate defendant shipped to plaintiff all material specified in contract which was accepted and paid for by plaintiffs at contract prices, contract was fully ratified by defendant and was binding notwithstanding that it was executed for defendant only by manager of local sales office, while contract required final acceptance by vice president, treasurer or general sales manager.

5. Contracts 🔑22(1)

A provision in an offer specifying a means of acceptance is for benefit of offerer and may be waived by him.

6. Contracts 🔑152

Conditions printed on the back of a contract which the parties expressly agree to be part of their contract are binding on both parties.

7. Contracts 🔑103

Parties may agree by their contract to the limitation of their liability in the event of a breach.

8. Sales 🔑418(6)

Where contract provided for delivery f.o.b. seller's foundry upon which seller's responsibility ceased and further provided that no charges for labor or expense to repair defective material, or for any consequential damages would be allowed against seller, seller was not liable for any expense incurred in repairing defective material or for any consequential damages, and buyers were limited to damages in a sum equivalent to price of defective material.

9. Sales 🔑201(2)

Provision in sales contract that prices of cast iron pipe were f.o.b. foundry with full freight allowed to trenchside wherever accessible with standard truck and trailer, was modified by subsequent provision therein, that delivery was to be made f.o.b. seller's foundry upon which seller's responsibility ceased, so that first provision referred to and qualified price for pipe, and did not affect time at which title to property passed.

10. Sales 🔑87(2)

Where plaintiffs contended that they had no notice of defendant's terms and conditions of sale and that sale was not made on terms claimed by defendant, and there was a dispute as to what documents constituted contract between parties, various documents consisting of quotations of prices and conditions upon which defendant would enter into a contract with plaintiffs were admissible to refute plaintiff's contention and for purpose of permitting trial court to determine which documents evidenced the ultimate contract.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by P. Artukovich and J. Artukovich, a copartnership, doing business under the firm name of P. & J. Artukovich, against Pacific States Cast Iron Pipe Company to recover consequential damages for an alleged breach of contract. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Stephen Monteleone, of Los Angeles, for appellants.

Arnold Praeger, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover consequential damages for an alleged breach of contract, plaintiffs appeal.

[1] The evidence being viewed in the light most favorable to defendant (respondent) and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

On May 29, 1944, defendant entered into a contract to sell plaintiffs a certain quantity of cast iron pipe. After the pipe was delivered to plaintiffs they instituted the present suit seeking to recover consequential damages alleging that some of the pipe was either defective or damaged by the negligent handling of the same by defendant.

Plaintiffs urge reversal of the judgment on five propositions which will be stated and answered hereunder seriatim:

First: *The finding by the trial court that the agreement between the parties was executed on the 29th day of May, 1944, is not supported by the evidence since on its face it appears that the offer of defendant was dated May 29, 1944, while the date of plaintiffs' acceptance was May 25, 1944, it being obvious that an acceptance may not be made before an offer is extended.*

[2, 3] Such proposition is untenable for the reason that the date which an instrument bears is only presumptive evidence that it is truly dated. The actual date on which the document is executed may be shown by evidence other than the document itself. In the present case two witnesses, Mr. Webb and Miss Lundy, testified that plaintiffs' acceptance of the contract and the placing of his signature thereon in fact took place on May 29, 1944 and not on May 25, 1944. This testimony, believed by the trial judge, constitutes substantial evidence to sustain the finding that the contract between the parties was made on May 29, 1944.

Second: *The contract was not binding since it had been executed for defendant by Mr. Webb only, who was manager of its Los Angeles office and the agreement provided that "All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice-President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo-Utah, for final acceptance."*

[4, 5] This proposition is also untenable for the reason that all the material specified in the contract was shipped by defendant to, accepted and paid for by plaintiffs at the price and on the terms specified in the contract; thus defendant, the principal, had fully ratified by performance the contract entered into by its local agent. In addition the provision in an offer specifying a means of acceptance is for the benefit of the offerer and may be waived by him. (Gallwey v. Galbreath, 45 Cal. App. 120, 122, 187 P. 73. See also Bandy v. Westover, 200 Cal. 222, 229, 252 P. 593.) Such waiver obviously occurred in the present case.

Third: *The trial court erred in refusing to permit plaintiffs to introduce evidence to prove consequential damages resulting from the alleged negligence of defendant in handling the pipe delivered to them.*

This proposition is untenable. Defendant's offer which plaintiffs accepted contained this provision:

"We are pleased to quote you on materials set forth below conforming to specifications in our catalog and subject to the terms and conditions as mentioned on the back of this sheet and hereby made a part hereof on this proposal, except as hereinafter modified." On the back of the contract was printed this provision:

"Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases—all claims for correction of (or) deductions must be made within ten days after receipt of goods—seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation. The measure of damage is the price of defective material only. *No charges for labor or expense required to repair defective material or for any consequential damages will be allowed.* * * *" (Italics added.)

[6-8] It is the rule that conditions printed on the back of a contract which the parties expressly agree to be part of their contract are binding on both parties. (Home Ins. Co. v. Los Angeles Warehouse Co., 16 Cal.App.2d 737, 738 et seq., 61 P.2d 510; Dickson v. Conde, 148 Ind. 279, 46 N.E. 998, 999; In re Goodman & Theise, Inc., 133 Misc. 473, 223 N.Y.S. 46,

47.) In the light of this rule since the parties agreed that the terms and conditions mentioned on the back of their agreement should become part of their contract, the above quoted provision limiting defendant's liability which was printed on the reverse side of the agreement became a part of the contract. In California parties may agree by their contract to the limitation of their liability in the event of a breach. (United Iron Works v. Standard Brass Casting Co., 98 Cal.App. 517, 521, 277 P. 183; Inner Shoe Tire Co. v. Tondro, 83 Cal.App. 689, 694, 257 P. 211; Union Investment Co. v F. M. Landon Co., 32 Cal.App. 305, 309, 162 P. 903.) Therefore defendant was not liable for any expense incurred in repairing defective material or for any consequential damages. Plaintiffs were limited by their contract to damages in a sum equivalent to the price of the defective material.

Fourth: *Defendant's liability did not cease until the pipe was delivered at the "trenchside" in Seal Beach, California.*

[9] This contention is without merit. The provision in the contract reading: "The above prices are f. o. b. our foundry at Provo, Utah, with full freight allowed to trenchside, Seal Beach wherever accessible with standard truck and trailer", is modified by another provision of the contract which reads: "Delivery is to be made F.O.B. seller's foundry, *upon which seller's responsibility ceases.*" (Italics added.) In view of the clause just quoted to the effect that delivery was to be made f. o. b. foundry the first provision mentioned supra referred to and qualified the price for the material and did not affect the time at which title to the property passed. (See Boston Iron & Metal Co. v. Rosenthal, 68 Cal.App. 2d 564, 568, 156 P.2d 963.

Fifth: *The trial court erred in receiving in evidence various documents consisting of quotations of prices and conditions upon which defendant would enter into a contract with plaintiffs.*

[10] This proposition is also without merit since plaintiffs contended that they had no notice of defendant's terms and contions of sale and that the sale was not made on the terms and conditions claimed by defendant. Clearly such evidence was admissible to show that plaintiffs did have notice of defendant's terms of sale. Likewise since there was a dispute by the parties as to what documents constituted their contract, such evidence was admissible for the purpose of permitting the trial court to determine from the transactions between the parties which documents actually evidenced their ultimate contract.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur in the judgment.

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77 Cal.App.2d 821

KRELING v. WALSH et al.

Civ. 15092, 15272, 15273.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1947.

Rehearing Denied Feb. 19, 1947.

Hearing Denied March 27, 1947.

1. Appeal and error 🔑931(1)

On appeal, District Court of Appeal was required to consider conflicting evidence most favorable to respondents.

2. Compromise and settlement 🔑23(3)

Evidence sustained finding of an oral agreement of compromise and settlement of pending actions.

3. Frauds, statute of 🔑129(1)

Where oral agreement of compromise and settlement of pending actions was performed in full by the parties, except that plaintiff did not withdraw his own money on deposit with clerk of Superior Court and did not enter into escrow provided for in agreement of settlement, agreement was not unenforcible under the statute of frauds. Civ.Code, §§ 1091, 1624, 1624a, 1724; Code Civ.Proc. §§ 1971, 1973, 1973a.

4. Frauds, statute of 🔑133

Portion of oral agreement for compromise and settlement of pending actions that dealt with delivery of stock in trade was not, after delivery of the stock, within the statute of frauds. Civ.Code, §§ 1624, 1624a; Code Civ.Proc. §§ 1973, 1973a.

5. Landlord and tenant 🔑70

Lease for a specified term of years was a "chattel real" and "personalty" and consequently not "realty".

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real", "Personalty" and "Realty".

6. Landlord and tenant 🔑109(1, 4)

A lease contract may be brought to an end by a surrender by the lessee with the acquiescence of the lessor.

7. Frauds, statute of 🔑104, 139(5)

Surrender of lease was not within statute of frauds, where oral agreement for surrender was embodied in a written memorandum, and the surrender was fully executed. Code Civ.Proc. § 1971; Civ.Code, § 1091.

8. Contracts 🔑42

Where acts of plaintiff manifested an intent to proceed in accordance with terms of written agreement that he had signed, there was "delivery" of the written agreement, though the agreement remained in plaintiff's possession. Code Civ.Proc. § 1933.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

9. Attorney and client 🔑103

Where plaintiff himself participated in discussion out of which oral agreement of settlement of pending actions arose and, after plaintiff's attorney, in conjunction with one of defendant's attorneys had prepared a written memorandum of agreement of settlement and explained the terms to plaintiff, the plaintiff fixed his signature thereto and proceeded to perform agreement, agreement was not invalid because plaintiff did not give his attorney written authorization to enter into the agreement.

10. Contracts 🔑32

A contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed on, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed.

11. Trial 🔑4

Trial court did not err in first trying the affirmative defense of settlement and compromise of the pending actions, before proceeding on the merits of the actions. Code Civ.Proc. § 597.

12. Appeal and error 🔑989

Where a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on the question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the verdict rendered by the jury.

13. Appeal and error 🔑1010(1)

Where record disclosed substantial evidence to warrant trial court in finding that the parties entered into an agreement settling all of their differences and controversies in pending actions, the District Court of Appeal could not disturb the conclusion arrived at by the trial court.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Three actions by Mike Kreling against Saul Walsh also known as Saul Wooltz, and others for forcible entry and unlawful detainer, for fraud, and for conversion. From judgments in favor of the defendants, the plaintiff appeals.

Judgments affirmed.

George D. Sphier, of Los Angeles (Frank P. Doherty, of Los Angeles, of counsel), for appellant.

Alfred Gitelson, of Los Angeles (Sidney L. Gordon and Louis Kaminar, both of Los Angeles, of counsel), for respondents.

WHITE, Justice.

Pursuant to an order made by this court, three appeals taken from separate judgments have been consolidated and are being considered upon a single set of briefs. The record before us reveals that all three appeals are the outgrowth of a controversy arising out of a lease of a gasoline "superservice" station for the sale of gasoline and other commodities used in the operation of motor vehicles, and upon which there was conducted a going business. The property leased was located at 16th and Main Streets in the city of Los Angeles. The lease in question was executed by the defendants herein as lessors to plaintiff under date of May 10, 1941, and, under the terms thereof, the defendants demised unto plaintiff for the term of ten years and seventeen days the aforesaid improved real property. The total consideration involved in the lease transaction was $75,342.72, payable in certain stipulated monthly installments.

From the record it appears that plaintiff entered into the possession of the leased premises and was carrying on the business when a dispute arose between him and defendant lessors as evidenced by the fact that on March 6, 1942, plaintiff filed his complaint against the defendants alleging that they had falsely and fraudulently misrepresented the net profits of the business which the service station was transacting at the date of the execution of the lease. This action in the superior court was numbered 473943, and like the other actions hereinafter to be mentioned, may in this opinion be referred to by its number.

Thereafter, on April 15, 1942, defendant Walsh, his wife and defendant Ann Wooltz, commenced an action numbered 818380 against plaintiff in the municipal court of the city of Los Angeles to recover rent allegedly due and unpaid under the terms of the aforesaid lease. This action was later transferred to the superior court wherein it was numbered 476334. By stipulation of the parties it was consolidated for trial with action No. 473943.

During the month of June 1943, plaintiff herein filed his complaint in action numbered 483841, alleging forcible entry and unlawful detainer by defendants of said service station.

On June 12, 1943, plaintiff herein filed action No. 486038 against the above-named defendants, grounded upon the alleged conversion of personal property located in said service station.

Joint answers were interposed by the defendants in each of the foregoing actions. In general, the answers denied the allegations of the complaint to which they were filed. In case No. 476334 (brought by Walsh et al. to recover rent), the defendant therein Kreling, in addition to his answer, interposed a counterclaim embodying the claim for damages for false representations which was the basis of his claim in action No. 473943.

In addition to their answers consisting, as above-noted, of denials of the allegations of the respective complaints, defendants set up an affirmative defense wherein it was alleged that all the parties to the litigation had entered into an oral agreement on January 8, 1943, and "that by the terms of said agreement, plaintiff and these defendants did compromise all claims existing on the part of these defendants as against said plaintiff and on the part of said plaintiff as against these defendants, said plaintiff forever releasing, discharging and acquitting these defendants from any obligation or liability unto said plaintiff and these defendants forever releasing, discharging and acquitting said plaintiff from any obligation or liability unto these defendants." All of the foregoing actions were set for trial and prior to the day of trial plaintiff herein gave notice that he would move the court for an order as follows:

"(1) That the trial of said action No. 483,841 (forcible entry and unlawful detainer) be immediately had.

"(2) That at the conclusion of the trial in said action No. 483,841 that the trial of the said action No. 486,038 (conversion) be had.

"(3) That at the conclusion of the trials in said actions No. 483841 and No. 486038 the trial of said action No. 473943 (fraudulent representation consolidated for trial with No. 476334 (rent)) be had.

"(4) That the evidence both oral and documentary, offered and received at the trial of said action No. 483841 be received and considered in so far as the evidence may be competent, relevant and material in said actions No. 486038 (fraudulent representation which was consolidated for trial with action No. 476334 (rent)) and No. 473943.

"(5) That the evidence both oral and documentary, offered and received at the trial of said action No. 486038 be received and considered in so far as the evidence may be competent, relevant and material in said action No. 473943."

On the day of trial the court granted this motion and proceeded to the trial of action No. 483841 (forcible entry and unlawful detainer). Pursuant to the provisions of section 597 of the Code of Civil Procedure, the court directed that in the trial of said action the issue of the affirmative defense pleaded by the defendants be first tried. Trial of the affirmative defense then proceeded. Each party introduced evidence and rested the case insofar as it related to the issue of the affirmative defense. Upon submission of the matter, the court announced in a written opinion its decision in favor of defendants in said action and against the plaintiff herein. The findings were made in accordance with the affirmative defense, and based thereon the court in its decision held that by the oral agreement of January 8, 1943, the parties to said action had compromised and settled all their differences and that each of said parties had discharged and acquitted the other of all existing claims and obligations. Thereafter, the court made similar findings in the fraud and conversion actions and rendered judgment upon the affirmative defense in favor of defendants and against plaintiff herein.

As we have seen, the trial court in its opinion sustained the affirmative defense interposed by defendants in all the actions then pending before it; that is, held that the oral agreement was entered into by all the parties on January 8, 1943, and was a "full and complete agreement" as to all of their differences. However, in the forcible entry and unlawful detainer action No. 483841, the agreement provided that "Saul Walsh shall be entitled to possession of said station and all receipts from the sale therefrom, subsequent to this date." In construing this provision of the agreement, the trial judge held: "Now, however, I cannot help but feel the agreement provided for possession of Mr. Walsh and his associates at the time they entered escrow proceedings. The escrow was not opened or offered to be opened until the 15th of January." From the record it appears that defendant Walsh took possession of the service station on January 13. For that reason, the court held: "And, so, I will have to find that while the defendant (Walsh) has completely performed all of his obligations under the agreement, the settlement was not to be effective until the 16th of January, and so, from the 13th to the 16th of January he was in unlawful possession of the premises." No evidence having been introduced as to extent of the damage, the court continued the trial of the case for the purpose of receiving evidence on that particular issue. Upon resumption of the trial on November 29, 1943, after evidence was introduced for the purpose of proving the damage sustained by the plaintiff for the three days when defendant Walsh was unlawfully in possession of the service station after January 13, the court fixed said damage at "$25 per day or $75 for the three days" and announced its judgment in favor of defendants on their affirmative defense, except that it gave plaintiff judgment for $75 as damages for the three days unlawful possession of the service station by defendant Walsh.

The judgments rendered by the court in all of the foregoing actions can be epitomized by saying that the court thereby held that any damages sustained by plaintiff by reason of any alleged wrongful actions upon the part of defendants had been settled and satisfied by the oral agreement of January 8, 1843. From such judgments plaintiff prosecutes these appeals.

[1] For a clearer understanding of the grounds urged by appellant for a reversal, it becomes necessary to here epitomize the testimony received at the trial of these actions. In so far as the evidence may be conflicting, it is axiomatic that on appeal we must consider the evidence most favor able to respondents. In accordance with that rule we feel justified in making the following statements of fact, although as to some of them there was a sharp conflict in the evidence.

When respondents filed their action to recover from appellant allegedly due and unpaid rents under the aforesaid lease, they caused a writ of attachment to issue upon the property of appellant. On January 13, 1943, pursuant to said writ of attachment, the sheriff of Los Angeles County was holding the sum of $763.18. There was also deposited by appellant with the Clerk of the Superior Court, subject to said writ of attachment, the further sum of $1,875, and there was also held by the Security-First National Bank of Los Angeles an additional sum of $2,684, aggregating in all the sum of $5,322.18.

When, on January 8, 1943, the consolidated actions were called for trial in the master calendar department of the superior court and transferred for trial to Department Two of said court, one John R. MacFarland, a salesman for The Texaco Company, and a friend of both appellant and respondent Saul Walsh, suggested to appellant that it would be advisable for all concerned that their difficulties be "settled out of court." Appellant stated to his counsel and to Mr. MacFarland that, by reason of the advent of gasoline rationing in December, 1942, coupled with his illness, he could no longer profitably carry on the operation of the gasoline service station and desired a settlement of the pending actions, provided that such settlement would give to appellant a full release from further liability under the existing lease. It should here be said that appellant was then in default for nonpayment of several months rent under the lease. Appellant requested his attorney to discuss with counsel for respondents a settlement of the pending actions. Thereupon, respondents' counsel, in the presence of respondent Saul Walsh and appellant Kreling, discussed with the latter's counsel terms of a proposed settlement. Respondents' counsel testified, and his testimony was corroborated by appellant's attorney, that following the discussion in the presence of appellant, his counsel and respondent Saul Walsh, "we finally arrived at an agreement whereby we agreed, first, to release Mr. Kreling from his further liability under the written indenture of lease covering the 16th and Main Street station. There was then under attachment approximately $5,200, representing the accumulation of rent unpaid under the lease, by Mr. Kreling, and attached by Mr. Walsh, as lessor; and then, under attachment, in the possession of both the clerk of the court—a portion of the $5200 or $5300, and the remainder of the $5200 or $5300 under attachment in the possession, I believe, of the Sheriff of the County of Los Angeles. Under our agreement, Mr. Walsh agreed to release payment to Mr. Kreling of 50 percent of the money which was held under attachment; agreeing to release Mr. Kreling from all further liability under the lease, and likewise agreeing to pay to Mr. Kreling an amount equal—and this was to Mr. Kreling—of the inventory put on the premises.

"Mr. Bridges (appellant's counsel) and I repeated the terms of the settlement in the presence of Mr. Graf (one of respondents' counsel) and our clients. Mr. Bridges and I agreed we would go into the courtroom of Judge Archbald, to whose department the case had been assigned, and whose department is on the eighth floor of the Hall of Records, cater-cornered from the master calendar department, where we had been before—and I might say that the conversation took place in the corridor leading to the department of the presiding judge, and then in the hallway leading to the department where Judge Archbald sat—Mr. Graf and Mr. Bridges and I then went to the courtroom of Judge Archbald and advised him in chambers that the case had been settled, and that there were to be certain releases of money held under attachment, and that we were repairing to my office to prepare those releases, covering the money under attachment. Judge Archbald thanked us, and, as I recall it, suggested that the matter go over for four or five days, to allow the preparation of the stipulation to release the moneys under attachment. Then Mr. Bridges and I went to my office."

Appellant's attorney explained each and every term of the settlement agreement to him and the latter expressed his approval of the same. Indeed, appellant testified as follows:

"Q. Now you recall that when you left the corridor on the eighth floor in front of Department One your own mind had come to the conclusion that a settlement had been reached, isn't that right? A. Yes."

And again:

"Q. No. After the meeting up there you didn't expect to go to trial? A. No.

"Q. You didn't expect ever to go to trial? A. No.

"Q. And you didn't expect after you left or at the time you left Department One, the corridor on the eighth floor, that at any time thereafter that the case against you for rents would be tried, did you. A. No."

After advising the judge in Department Two that the cases would be settled and a continuance of trial being ordered to January 13, 1943, counsel for appellant and respondents repaired to the latter's office and jointly dictated a memorandum of the agreement of settlement had between the parties at the court house, an order addressed to the Sheriff to release funds on attachment at the Security-First National Bank in action No. 618380, Municipal Court, a stipulation directed to the Sheriff to deliver to respondents' attorney for them the sum of $763.18 in superior court action No. 476334, a stipulation to the Clerk of the Superior Court directing him to deliver to respondents' attorney for them the sum of $1,875 in superior court action No. 476334, and an assignment of lease.

Preparation of the foregoing documents was completed during the afternoon of January 8, 1943. The memorandum of the agreement of settlement was signed by respondents and the assignment of lease was signed by respondent Saul Walsh. These documents were sent by respondents' counsel to the office of appellant's attorney who, in turn, on the same afternoon, forwarded two copies of the agreement of settlement, one signed by respondents, and the letter of transmittal of the aforesaid documents from respondents, to his client, appellant herein.

On January 11, 1943, appellant appeared at the office of his attorney, informed the latter that the inventory taken of the stock was much lower than he had anticipated and that he did not believe the proposed settlement was satisfactory. Appellant's attorney told him that the settlement had already been agreed upon by appellant and himself, asked to be relieved as appellant's counsel, and delivered to the latter the files in the respective actions.

After consulting other counsel, appellant returned to the office of his former counsel on January 12 and advised the latter that "he was going through with the agreement." Appellant stated to his attorney that he could not account for some porch swings and the cash register that he had leased from the respondents. Appellant's counsel thereupon spoke with one of respondents' counsel concerning the said equipment, and it was agreed to relieve appellant from responsibility for the return of such equipment. The memorandum of agreement was then amended in that respect. Stating that, with these changes, the agreement was satisfactory, appellant signed the memorandum of agreement and the assignment of lease, and thereupon left the office of his attorney to assist in the taking of the physical inventory.

After appellant had executed the memorandum of agreement and the assignment of lease, his attorney wrote a letter to respondents' counsel, with which he enclosed the signed releases and signed stipulations in connection with the settlement, and advised counsel for respondents that appellant had signed the memorandum of agreement and the assignment of lease and was awaiting the taking of the inventory. Appellant's counsel further requested that the aforesaid escrow be opened as soon as the inventory was completed.

On January 12, 1943, respondents' counsel wrote to appellant's attorney advising the latter that certain proposed amendments to the agreement were acceptable to respondents.

Following out the terms of the agreement of settlement and compromise arrived at on January 8, 1943, and the memorandum of agreement signed by appellant on January 12, 1943, the latter caused a written inventory of his personal property at the gasoline station to be taken on January 13, 1943. The inventory was taken by the aforesaid Mr. MacFarland, a representative of The Texaco Company, whose selection was agreeable to the appellant. The latter designated one of his employees to assist in the taking of the inventory and, during the course of the taking of such inventory, appellant produced invoices from different companies in order to determine the wholesale price of oils and other merchandise.

When completed, the written inventory contained an itemization and cost price of each and every article of personal property that respondents were purchasing, and was signed by appellant's employee, Mr. MacFarland, and respondent Saul Walsh, on January 13, 1943, on which date it was left with appellant. The total cost price of all the personal property represented in said inventory was the sum of $1,266.68.

On January14, Mr. MacFarland returned to the service station, and, in the presence of himself and respondent Saul Walsh, appellant read and examined the inventory, wrote the word "approved" on the same, affixed his signature on each sheet, and delivered the document to respondents. There is also evidence that after appellant had approved and signed the inventory, he packed his private papers, gave the keys to the safe and strong box to respondent Saul Walsh, surrendered the possession of the service station and departed therefrom. At the time the inventory was taken, appellant gave respondent Saul Walsh keys to the service station. In explanation of his delivery of the keys to respondent Walsh, appellant testified, "I had no more use for them; he had another lock on the door." It is also in evidence that, at the time the inventory was taken, appellant signed a letter addressed to the Southern California Telephone Company requesting the transfer of the telephone service at the service station to respondents. Appellant also applied to the water department, electric department, gas company, and the State Board of Equalization for the return of the deposits that he had made with such companies. Accompanied by Mr. MacFarland and respondent Walsh, appellant went to the office of the War Rationing Board and there signed transfers turning over to respondent Walsh his gasoline rationing coupons.

On January 16, 1943, counsel for respondents wrote to the Security-First National Bank of Los Angeles proposing the opening of an escrow concerning the sale of the stock in trade of the gasoline station to respondent Saul Walsh from appellant, and enclosed with such letter duplicate originals of dismissal with prejudice of actions No. 473943 and 476334; duplicate originals of assignment of lease, signed and accepted by respondent Saul Walsh; duplicate originals of agreement of compromise signed by all respondents; duplicate originals of inventory of stock at the service station taken on January 13, 1943 and approved by appellant; and a check in the sum of $1,266.68 representing the full purchase price of the stock in trade as set forth on the aforesaid inventory. On January 18, 1943, the bank returned these various documents to respondents' counsel stating that the bank was advised that appellant's counsel had withdrawn as his attorney. On January 18, 1943, other counsel appeared in Department Two of the superior court and was substituted as attorney for appellant.

[2] As his first ground for reversal, appellant contends that the evidence is insufficient to support the finding that an oral agreement of compromise and settlement was entered into between himself and respondents. Appellant's argument that the discussions outside the courtroom of Department Two were purely tentative, conditional and mere informal preliminary discussions to be used in formulating a later formal written agreement, is unavailing. A mere reading of the testimony hereinbefore narrated renders such an argument untenable. The agreement was so definite and certain that the parties requested a postponement of the trial on the ground that a settlement of the controversies had been agreed upon.

Appellant, however, contends that though we assume the existence of such an oral agreement, it was invalid and unenforceable because it contravened the statute of frauds in that it provided for:

(a) A bill of sale of goods valued at more than $500 (Civil Code, secs. 1624, 1624a, 1724; Code Civ. Proc., secs. 1973, 1973a);

(b) A surrender of an estate and interest in real property other than a lease for a term not exceeding one year, Code Civ. Proc., sec. 1971; Civil Code, sec. 1091.

[3, 4] It is further urged by appellant that the alleged agreement, being one re-

quired by its terms to be in writing, his attorney, in order to make such an agreement on behalf of appellant, would have to be authorized to do so in writing. These contentions are equally unavailing. There was substantial evidence to support the court's finding that not only did appellant enter into an oral agreement of compromise and settlement, but that he later signed a contract embodying the terms of such oral agreement. Furthermore, the agreement was performed in full by appellant and respondents, save and except that the former did not withdraw his own money on deposit with the Clerk of the Superior Court and did not enter into the escrow provided for in the agreement of settlement. The statute of frauds has no application to an executed agreement. James v. Hall, 88 Cal. App. 528, 534, 264 P. 516; Freitas v. Freitas, 31 Cal.App. 16, 19, 159 P. 611; Bates v. Babcock, 95 Cal. 479, 488, 30 P. 605, 16 L.R.A. 745, 29 Am.St.Rep. 133. It is unnecessary to here repeat appellant's course of conduct as hereinbefore set forth, in compliance with the terms of agreement. Delivery of the stock in trade sold to respondents having been made by appellant, that portion of the agreement does not come within the purview of the statute of frauds. Civ. Code, secs. 1624, 1624a; Code Civ.Proc., secs. 1973, 1973a.

[5–7] Neither can appellant be sustained in his claim that the surrender of the lease in the instant proceedings violated the statute of frauds. The lease herein, being for a specified term of years, is a chattel real, is personal property, and consequently is not real property or real estate. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 352, 45 P. 680; City of Santa Barbara v. Maher, 25 Cal.App.2d 325, 327, 77 P.2d 306. Leases for a definite term of years fall within the definition of personal property and are not governed by the rules applicable to real property. Furthermore, in the instant cases we are confronted with substantial evidence that the leased premises were surrendered by the lessee with the acquiescence in such surrender by the lessor. And a lease contract may be brought to an end by such means. Steel v. Thompson, 59 Cal.App. 191, 192, 210 P. 430. In the state of the evidence before us it must be held that the agreement here in question is without the statute of frauds for two reasons, viz, the terms of the oral agreement were embodied into a written memorandum of agreement and settlement, and if it be construed as an oral agreement only, the statute of frauds cannot affect it because, though it be designated as a parol contract, it was fully executed. Atkinson v. Boynton, 111 Cal.App. 128, 130, 295 P. 352.

[8] Appellant next challenges the validity of the written agreement on the ground that though he signed it, appellant never delivered it to respondents. The physical transfer of a document is not indispensable to its validity. In the instant case, the court found on clear and substantial evidence that the written agreement was executed by the respective parties thereto. While section 1933 of the Code of Civil Procedure provides that "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal," nevertheless, retention of an instrument by one of the parties after both have signed it is not conclusive evidence of its nondelivery. It must be considered as delivered if the parties understand it has been executed and is in operation. That delivery of an instrument is a question of intent has long been the rule in this state. If from any or all of the circumstances, appellant manifested or made known his intention to depart with his dominion and control over the instrument to the end that its terms might be put into effect, then "delivery" was sufficient and complete. We find in the record before us sufficient competent evidence upon which the trial court could base the conclusion that the conduct and acts of appellant manifested an intent to proceed in accordance with the terms of the written agreement which he had signed. That is sufficient to constitute delivery in contemplation of law though the instrument itself remained in the possession of appellant. Moore v. Trott, 162 Cal. 268, 274, 122 P. 462; Chovin v. Miranda, 18 Cal.App. 2d 193, 195, 63 P.2d 845; Bloom v. Pacific Mut. Life Ins. Co., 85 Cal.App. 419, 428, 259 P. 496.

[9] From the foregoing it is at once apparent that appellant's contention that writ-

ten authorization was required before his counsel could act for him is without merit. Appellant himself participated in the discussions out of which the oral agreement of settlement arose, and after his attorney, in conjunction with one of respondents' attorneys, had prepared a written memorandum of agreement of settlement and explained the terms thereof to appellant, the latter affixed his signature thereto and proceeded as shown by the evidence herein set forth, to perform certain of the terms of the agreement. At the trial, appellant also testified as follows:

> "Q: Then at least you considered that Gerald Bridges had from you the authority to dismiss your lawsuit in exchange for a dismissal of the lawsuit against you, as a part of the agreement that you thought you entered into that day, didn't you? A: Yes."

The terms of the agreement having been agreed upon by appellant, and his counsel having merely prepared the written memorandum thereof, the question of the attorney's authority to act for appellant, under the provisions of section 283 of the Code of Civil Procedure, are not involved in this appeal. Whatever substantial rights were surrendered by appellant were given up by him voluntarily, and his attorney acted only as directed by him in preparation of the written agreement of settlement to which appellant had agreed.

[10] Appellant next asserts that the understanding between the parties was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them. The answer to this contention is that the findings of the trial court, based upon competent and substantial evidence, were to the contrary. And in any event, the terms of the oral agreement were reduced to writing and appellant signed such written instrument and fully performed the same except for the withdrawal of his own money on deposit with the county clerk and entering into the proposed escrow. Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is —did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform. Thompson v. Schurman, 65 Cal.App.2d 432, 440, 150 P.2d 509; Nolte v. Southern California Home Building Co., 28 Cal.App.2d 532, 534, 82 P.2d 946; Clarke v. Fiedler, 44 Cal.App.2d 838, 847, 113 P.2d 275.

The case of Spinney v. Downing, 108 Cal. 666, 41 P. 797, and other authorities cited by appellant, go no further than to establish the rule that, when in negotiating the terms of their contract the parties agree and understand that the same shall be reduced to writing and signed by them, in order that it may become a binding and completed contract, the assent to its terms must be evidenced in the manner agreed upon. Such a situation is not here present. The evidence sustains the view of the trial court that there existed an oral agreement of settlement between the parties. That a written instrument was later made to evidence such oral agreement does not change the binding effect of the oral agreement.

[11] Appellant's contention that the trial court committed error amounting to an abuse of discretion by first trying the affirmative defense of settlement and compromise, which was a bar to appellant's cause of action, is without merit. In this regard, appellant asserts that the court did not follow the provisions of section 597 of the Code of Civil Procedure which provides that if the decision of the court on the special defense "is in favor of the defendant pleading the same judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had * * *." Appellant claims that while the court found in favor of defendants on the special affirmative defense, it "also purported to try other is-

sues raised by the allegations of the complaints in the forcible detainer action." But such is not the case. While the court held that the oral agreement was entered into by all the parties on January 8, 1943, and was a "full and complete agreement" as to all of their differences, it decided that the agreement provided for respondent Walsh and his associates to take possession of the service station at the time they entered escrow proceedings. That while respondent Walsh took possession on January 13, the escrow was not opened or offered to be opened until January 15; that therefore, from January 13 to January 16 respondent Walsh was in "unlawful possession of the premises." Evidence was taken only for the purpose of proving the damage sustained by appellant for the aforesaid three days when respondent Walsh was unlawfully in possession of the service station after January 13. Judgment was thereafter announced in favor of respondents Walsh et al., on their affirmative defense, except that judgment was awarded appellant for $75.00 for the aforesaid three days. Such procedure did not impinge upon the provisions of section 597 of the Code of Civil Procedure. To us this case seems a most appropriate one in which the court was justified, when the special affirmative defense would dispose of the case without a long trial, to resort to the provisions of section 597 of the Code of Civil Procedure. As was said in Booth v. Bond, 56 Cal.App.2d 153, 156, 132 P.2d 520, 522, "The clause of section 597 of the Code of Civil Procedure we are considering does not seem to have added a great deal to powers of courts to regulate the order of proof under the provisions of section 2042 of the Code of Civil Procedure. Under the powers granted by that section it has been held that trial courts had authority to hear special defenses that would bar a recovery by a plaintiff. In re Estate of Wickersham, 153 Cal. 603, 96 P. 311; In re Estate of Smith, 176 Cal. 729, 171 P. 289; Smeland v. Renwick, 50 Cal.App. 565, 196 P. 283."

Appellant's attack upon the findings of fact as not being supported by the evidence cannot be sustained. It is true there was evidence contradictory to some of that narrated herein as to the circumstances surrounding the making of the agreement of settlement, as well as to appellant's conduct with reference to the written agreement, and his actions in delivering keys of the service station to respondent Walsh, making application to change the telephone listing, and for return of deposits made by him to public utility corporations. But there was also positive testimony to the contrary, as hereinbefore set forth, much of which was corroborated by other testimony which need not here be set forth.

[12] In view of the foregoing, and where, as here, appellant challenges the judgment on the ground that the record is barren of any substantial evidence to support the same, it is well settled and firmly established in our law, as was said in Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487, that "When a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183."

What was said by this court in Poe v. Lawrence, 60 Cal.App.2d 125, 131, 140 P.2d 136, 140, is strikingly applicable to the case at bar: "Legion of authority supports the statement that when an attack is made upon a judgment on the ground that it is unsupported by the evidence, the power of reviewing courts is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered. Therefore, on appeal from a judgment for plaintiffs in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the prevailing party. Because it is the rule that all intendments are in favor of the judgment arrived at upon conflicting evidence, the fact that contradictory inferences can reasonably be drawn from the facts in evidence does not authorize an appellate tribunal to substitute other inferences for those drawn by the constitutional and statutory arbiter of the facts. Of course, if the evidence is inherently improbable it may be disregarded, but before such action is warranted there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without any resort to inferences or deductions. Whitsett v. Morton, 138 Cal.App. 628, 629, 630, 33 P.2d 54; Arundel v. Turk, 16 Cal.App.2d 293, 295, 296, 297, 60 P.2d 486."

[13] Since the record herein discloses substantial evidence to warrant the trial court in finding that the parties entered into an agreement settling all of their differences and controversies which was the ultimate issue presented for decision, we cannot disturb the conclusion arrived at by the trier of facts.

The judgments and each of them must therefore be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

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77 Cal.App.2d 869

TAYLOR v. WESTERN STATES LAND & MORTGAGE CO. et al.

STATE v. TAYLOR.

Civ. 15515.

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1947.

1. Escheat 🔑6

Evidence that, after commencing action to quiet title to bank account standing in name of dissolved corporation wherein state intervened claiming account by escheat, plaintiff mailed $1 to bank for deposit in account for which she received a receipt from bank, but that bank auditor refused to credit the then dormant account with such deposit in absence of proof of assignment of account to plaintiff and returned money tendered for deposit, supported finding that no deposit was made. Code Civ. Proc. § 1269a.

2. Escheat 🔑3

Mere attempt by someone showing no connection with or interest in dormant bank account to make a deposit therein did not constitute a "claim" thereto within statute relating to escheat of bank accounts remaining unclaimed for more than 20 years. Code Civ.Proc. § 1273.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

3. Statutes 🔑174

Construction of a statute must be consonant with sound sense and wise policy and with a view of promoting justice.

4. Escheat 🔑3

The statute relating to escheat of unclaimed bank accounts contemplates a valid, bona fide claim, since the purpose of statute is to protect rightful owner of account against its escheating to the state. Code Civ.Proc. § 1273.

5. Escheat 🔑6

In action by one showing no connection with or interest in dormant bank account to quiet title thereto, wherein state intervened claiming account by escheat, evidence supported finding that neither depositor nor any claimant had filed any notice with bank showing present address, though plaintiff in attempting to make deposit in such account gave her address on deposit slip. Code Civ.Proc. § 1273.

6. Appeal and error 🔑1195(3)

Decision of appellate court, on appeal from order permitting state to intervene in action to quiet title to dormant bank account, that court could determine in quiet title action whether account escheated or whether plaintiff had a superior claim thereto, became the law of the case. Code Civ. Proc. §§ 1269a, 1273.

7. Trial ⚷396(3)

Finding that plaintiff in action to quiet title to dormant bank account had no interest therein was within issues presented by quiet title action, petition in intervention to have account declared escheated to the state, and law of the case laid down on previous appeal that court could determine in quiet title action whether account escheated or whether plaintiff had a superior claim thereto.

8. Judgment ⚷174

Where state claiming title to dormant bank account by escheat was permitted to intervene in action to quiet title to such account and default judgment quieting plaintiff's title to account was set aside, such default judgment was not res judicata and immune to collateral attack.

9. Appeal and error ⚷877(2)

Where state intervened in action to quiet title to dormant bank account claiming account by escheat but petition for escheat of account was not published as required by statute, partial judgment that plaintiff had no interest in account without determining whether account escheated to state was authorized by statute providing for judgment against one or more of several defendants and plaintiff could not complain of lack of statutory publication or service of petition for escheat on other parties, since she was not affected thereby. Code Civ.Proc. §§ 579, 1269a, 1273.

10. Constitutional law ⚷305

Judgment that plaintiff had no interest in dormant bank account claimed by state under escheat did not deprive plaintiff of property without due process of law, where plaintiff had a full and fair hearing and was given every opportunity to meet state's evidence that she possessed no valid claim to and was not the owner of such account. Code Civ.Proc. § 1273.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Eva Taylor against Western States Land & Mortgage Company and others to quiet title to real estate and bank accounts, wherein the State of California was permitted to file a petition of intervention to have a bank account in First Trust & Savings Bank of Pasadena standing in the name of Pasadena Land & Water Company declared escheated to the State of California. From a judgment that plaintiff had no right, title, or interest in such bank account, plaintiff appeals.

Judgment affirmed.

William M. Taylor, of Beverly Hills, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

On April 2, 1942, plaintiff filed in the Superior Court of Los Angeles County her complaint to quiet title against numerous corporations and individuals. On April 23, 1942, an amended complaint was filed. By her amended complaint, plaintiff claimed to be the owner of several different parcels of real property and bank accounts, including a bank account in First Trust and Savings Bank of Pasadena standing in the name of Pasadena Land and Water Company. On July 9, 1942, plaintiff obtained a partial judgment by default, quieting her title as to said bank account of the aforesaid Pasadena Land and Water Company on deposit in said bank.

By a minute order of the court entered August 28, 1942, this default judgment was vacated, at which time it was also ordered that the state of California be permitted to intervene in the proceedings and that the First Trust and Savings Bank of Pasadena be permitted to deposit with the clerk of the court the funds of such bank account.

On September 2, 1942, a petition in intervention was filed by the state of California pursuant to the terms of section 1269a of the Code of Civil Procedure to have said bank account declared escheated to the state of California.

An appeal was taken from the order vacating the default judgment, and permitting the state to intervene. Taylor v. Western States Land and Mortgage Co., 63 Cal.App.2d 401, 147 P.2d 36, 38. Upon such appeal it was held that "what we have said respecting the State's right to intervene establishes it as a necessary if not an indispensable party to plaintiff's action to obtain the bank account which the State claims." The order vacating the default and the default judgment was modified on appeal so that it affected the judgment only, and as so modified, the order was affirmed.

By her amended complaint and by her answer to the petition for intervention, plaintiff asserted that she was the owner of the particular bank account here involved. The state, on the other hand, by its petition in intervention, claimed that the bank account in question had been dormant for more than twenty years, and under the law should escheat to the state of California.

Trial before the court resulted in a judgment that plaintiff herein "has no right, title or interest of any nature whatsoever in said bank accounts standing in the First Trust and Savings Bank of Pasadena in the name of the Pasadena Land and Water Company."

The judgment also specifically provided that the same "does not affect any rights whatever of the Pasadena Land and Water Company or of the First Trust and Savings Bank of Pasadena in and to those bank accounts standing in the said bank in the name of the Pasadena Land and Water Company; and the State of California, Intervenor herein, may pursue any remedy it may have either in this action or some other action regarding said bank accounts." From such judgment plaintiff prosecutes this appeal.

In so far as the factual background of this litigation is concerned, we deem it a fair epitome of the evidence to say that by stipulation or testimony it was established at the trial that the Pasadena Land and Water Company was dissolved not later than the year 1914. The Secretary of the company, who was the authorized signer of checks drawn on its account, testified that he had not signed any such checks since 1914. It was stipulated that for more than twenty years previous to January 1, 1942, there were no withdrawals, deposits or claims made with reference to said account. The ledger sheets of the bank showed that no withdrawals and no deposits were made in the year 1942, and that no earned interest was withdrawn. No notice was filed by the Pasadena Land and Water Company showing its residence or showing a change of residence; the auditor of the bank was aware of the fact that the city of Pasadena had purchased the Pasadena Land and Water Company and that the latter company was thereafter non-existent.

About June 7, 1942, appellant mailed to the aforesaid bank a check in the sum of $1, accompanied by an original and duplicate deposit slip. The check bore date of June 7, 1942, was drawn on the Western Trust and Savings Bank of Long Beach, payable to the order of Eva Taylor (appellant herein), and signed by William M. Taylor. Said check was indorsed: "Deposit to and in the account of Pasadena Land and Water Co., Eva Taylor." The deposit slip was made out for "Pasadena Land and Water Co., % Eva Taylor, 1263 East Ocean Boulevard, Long Beach." The duplicate deposit slip was returned by mail to appellant bearing the initials of a bank teller, indicating that the amount thereon had been received. However, on June 16, 1942, the bank, through its Assistant Secretary, F. R. Backus, addressed a communication to the appellant enclosing to her a cashier's check for $1.00 and stating in part, "This is a return of the $1.00 which you enclosed in your letter of June 6 for deposit to the account of Pasadena Land and Water Company. We are unable to accept this deposit until we are furnished with absolute proof that there has been an assignment made by the company to you." Appellant had no further dealings with the bank.

The auditor for the bank testified that when a deposit is presented, either by mail or over the counter, the teller will automatically take the same in and give a deposit slip or make an entry in the customer's account book as a receipt whether the account is an active account or whether it as called a "sundry account." In this case, it being a "sundry account," the auditing department, which had "surveillance" of the account, refused to credit the same deposit by reason of the fact that there was no Eva Taylor connected with the account. As soon as this matter was brought to the attention of the auditor and the circumstances checked, the bank, as aforesaid, remitted a cashier's check to plaintiff in payment of the deposit previously taken in.

So far as the record discloses, appellant's only claim to the bank account here in question, is grounded upon her attempted deposit of $1 therein on June 7, 1942.

[1] As grounds for reversal, appellant first contends that there is no evidence in the record to support the finding that no deposit had been made. This claim is without merit. The record reflects that on June 7, 1942 (more than two months after the commencement of this action), appellant attempted to make a deposit of $1 in the then dormant bank account, that she received a receipt from the bank for said sum, but when the matter came to the attention of the bank auditor in charge of dormant accounts, he refused to credit the account with such deposit, and returned the same to appellant with a letter explaining the reasons for such refusal. Appellant had no further dealings with the bank, and at the trial made no further effort to show that, by assignment or otherwise, she had acquired any right, title or interest in said account. Appellant's efforts amounted only to a futile attempt to make a deposit to an account in which, so far as the record discloses, she had no interest. The court's finding in that regard was fully justified.

[2-4] Appellant next asserts that the record contains no evidence to support the finding that the account was unclaimed for more than twenty years. Code Civ.Proc., sec. 1273. The only claim to the account was made by appellant through her attempted deposit therein on June 7, 1942. Relying on that portion of section 1273 of the Code of Civil Procedure which reads, "which shall have remained unclaimed for more than twenty years," appellant insists that the claim of the state of California as to dormant bank accounts may be defeated *by any claimant*. Appellant's contention seems to be that the mere attempt to make a deposit by someone without any connection with or interest in a dormant account constitutes a "claim" within the meaning of section 1273 of the Code of Civil Procedure. Such a construction of the language of the statute challenges credulity and does violence to reason. Construction of a statute must be consonant with sound sense, wise policy and with a view of promoting justice. What the statute here under consideration contemplates is a *valid* claim and that only. Tennessee Consolidated Coal Co. v. Commissioner of Internal Revenue, 6 Cir., 1941, 117 F.2d 452, 454. The language of the statute clearly indicates a meaning that an account cannot be classified as "remaining unclaimed" when a *valid* and *bona fide* claim is made thereto. In Security Savings Bank v. People of State of California, 263 U.S. 282, 44 S.Ct. 108, 109, 68 L.Ed. 301, 31 A.L.R. 391, which was an action to declare bank deposits escheated to the State of California under section 1273 of the California Code of Civil Procedure, the Supreme Court of the United States, in speaking of this particular statute, said:

> "A *valid* claim to a deposit duly made at any time prior to entry of the judgment prevents its transfer to the state. Mathews v. Savings Union Bank & Trust Co., 43 Cal. App. 45, 48, 184 P. 418; State v. Savings Union Bank & Trust Co., 186 Cal. 294, 298, 199 P. 26." (Emphasis added.)

The purpose of the statute is to protect the rightful owner of a bank account against its escheating to the state, and if this purpose is to be conserved, it must be held to apply only to valid claims and not fictitious ones.

[5] For the same reasons, it must be held that the court's finding that under the statute "neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence" (Code Civ.Proc., sec. 1273) is abundantly supported by the evidence and the circumstances surrounding the attempt to deposit by appellant, which is the only effort she made to comply with the statute in regard to notifying the bank of her present address.

[6] Appellant's contention that the finding that she had no interest in the account was not a matter within the issues framed by the petition in intervention is equally unavailing. In asserting this claim, appel-

lant ignores the holding of the District Court of Appeal in the prior appeal of this case (Taylor v. Western States L. & M. Co., supra) and which became the law of the case. In the prior appeal, 63 Cal.App.2d at page 404, 147 P.2d at page 38, the court stated:

[7] "The State might have brought an independent action to obtain its decree, as authorized in section 1273, but inasmuch as the account which had escheated, within the meaning of section 1273, was property involved in plaintiff's quiet title action, the State properly sought intervention in that action. Sec. 1269a, Code of Civ.Proc. Intervention having been granted, the court in the quiet title action may proceed to determine whether or not the account escheats *or whether plaintiff has a superior claim to it,* without the necessity of bringing the action authorized by section 1273. Mathews v. Savings Union Bank & Trust Co., supra, 43 Cal.App. 45, 50, 51, 184 P. 418." (Emphasis added.) The challenged finding determined that with reference to the bank account, appellant had no "superior claim to it" or in fact had no claim whatsoever to the account in question. This finding was directly within the issues presented by the quiet title action brought by plaintiff, the petition in intervention filed in accordance with the provisions of section 1269a of the Code of Civil Procedure, and the law of the case as laid down in the previous appeal. That the court did not decide that the account escheated to the state of California, or whether the same will eventually so escheat, is immaterial in this proceeding. There having been no publication as provided in section 1273, the judgment, which was a partial one only, determined the claim of appellant adversely to her, and specifically decreed that such judgment did not affect the water company or the bank, and that the state may pursue any remedy it may have, either in the instant action or in some other action concerning said bank account.

[8] Appellant's contention that her "default judgment operates on res judicata and is immune from collateral attack and as long as a default stands it is the court's duty to enter another judgment on it" is devoid of merit. Appellant had no default judgment. It was set aside. The state was permitted to intervene and the issues to be tried upon such intervention were determined upon the prior appeal which became the law of the case. The case of Christerson v. French, 180 Cal. 523, 182 P. 27, cited by appellant has no application to the case at bar. In the cited case, the action was one arising upon contract for recovery of damages and is governed by subdivision 1 of section 585 of the Code of Civil Procedure. The instant action does not come within the purview of subdivision 1 of the last-cited code section.

[9] Appellant urges that the state failed to sustain the burden of proof cast upon it because the notice required by the statute was not published. This argument might assume some force had the court decreed that the bank account escheated to the state, but the court did not so decree. The partial judgment entered herein was authorized by section 579 of the Code of Civil Procedure, which provides that in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. In this proceeding the court did not adjudicate the rights of anyone except the relative rights between the state of California and appellant. The latter cannot be heard to complain that there was no statutory publication or service of the petition in intervention on the other parties because she is not thereby affected. As heretofore pointed out, the evidence is not only ample but convincing in support of the judgment rendered as to the claimed rights of appellant to the bank account in question.

[10] Finally, appellant asserts that she has been deprived of property without due process of law. We are not directed to, nor do we find in the record any grounds supporting this claim. Appellant offers no citation of authority except a general reference to the Constitution of the United States and of the state of California. Appellant was afforded a full and fair hearing, and was given every opportunity to meet the state's evidence that she was not possessed of any valid claim to and was not

the owner of such bank account. As was cogently observed by the trial judge at the conclusion of the final argument by appellant's counsel, "as to what her claim is, you have successfully kept a secret from the court." In the conduct of this proceeding all constitutional guarantees were fully complied with. This case is not one where the proceedings have gone beyond the boundaries of justice and where property has been lost without the rightful sanction of law.

The judgment appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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77 Cal.App.2d 921

CITY OF BERKELEY et al. v. JENSEN.

Civ. 13408.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1947.

1. Municipal corporations 🔑141

The provision of city charter that no councilman should be elected to any office the compensation of which was increased while he was a member thereof could not be avoided in case of appointment of councilman to position of city manager on theory that, because of council's discretion in fixing manager's salary, a salary was fixed for the incumbent and not for the office, and that increases of compensation for former city managers during councilman's term did not increase compensation for the office.

2. Municipal corporations 🔑63(1)

The fact that enforcement of charter provision prohibiting election of councilman to office the compensation of which was increased by council while he was a member might deprive city of competent public service could not be considered by court as ground for not applying the provision, but was a matter which should be addressed to framers of city charter and to the electorate.

3. Municipal corporations 🔑141

Where city council, which had previously increased salary paid to former city managers, appointed mayor, who was a councilman, as city manager and then rescinded its action, but reappointed him after he had resigned as mayor, appointment was in violation of charter provision prohibiting councilman from being elected to any office the compensation of which was increased by council while he was a member.

Petition by the City of Berkeley and Fitch Robertson, individually, and as city manager of the City of Berkeley, against Mabel W. Jensen, as Auditor of the City of Berkeley, for a writ of mandate to compel the auditor to issue her warrant for the payment of a designated sum of money to the East Bay Municipal Utility District for fire hydrant rental for the month of December, 1946.

Alternative writ discharged and petition for peremptory writ denied.

Fred C. Hutchinson, City Atty., for petitioners City of Berkeley and Fitch Robertson, as City Manager of City of Berkeley.

Hagar, Crosby & Crosby, of Oakland, for petitioner Fitch Robertson, individually.

Redmond C. Staats and Redmond C. Staats, Jr., both of Berkeley, for respondent.

PETERS, Presiding Justice.

This is a petition for a writ of mandate to compel the auditor of the city of Berkeley to issue her warrant for the payment of a designated sum of money to the East Bay Municipal Utility District for fire hydrant rental for the month of December, 1946. There is no dispute concerning the intrinsic validity of the claim, but respondent places her refusal to issue the warrant on the sole ground that the approval of the claim by city manager Fitch Robertson, which approval is required by the Berkeley charter (§ 61), was invalid because the appointment of Robertson as city manager was illegal, being, so it is charged, in violation of certain charter provisions. The sole issue presented relates to the validity of the appointment of Robertson as city manager.

The facts are alleged in the petition and admitted by the demurrer of respondent. Robertson was elected mayor of Berkeley for a four-year term commencing July 1, 1943, and terminating June 30, 1947. Under the charter provisions then and now in effect the mayor is a member of the city council, is the president of that body (Charter, § 39) and has the right to vote on all matters coming before the council (Charter, § 21). When Robertson assumed the duties of mayor on July 1, 1943, one Fisk was city manager serving at a salary fixed by the council of $7,500 *per annum.* In June of 1944 Fisk resigned and Vander Ende was appointed city manager by the council of which Robertson was then a member to serve at a salary fixed by the council of $8,500 *per annum.* On July 1, 1945, the council of which Robertson was then a member increased the salary of Vander Ende as city manager to $10,000 *per annum.* In December, 1946, Vander Ende resigned as city manager, such resignation to be effective January 15, 1947. This resignation was accepted by the council on December 17, 1946, and on December 20, 1946, by formal resolution the council of which Robertson was then a member appointed Robertson city manager to take office January 16, 1947, at an annual salary of $9,000. On January 14, 1947, the council, Robertson still being a member, by formal resolution rescinded its resolution appointing Robertson city manager. This resolution of rescission was apparently adopted to avoid the legal effect of the charter provisions hereafter mentioned. On the same day—January 14, 1947—Robertson resigned as mayor of Berkeley, such resignation to take effect immediately, and the council accepted such resignation. A week later—January 21, 1947—the council, Robertson not then being a member—by resolution appointed Robertson city manager to take office January 22, 1947, at an annual salary of $9,000. It is the validity of this appointment that is involved in this proceeding.

Section 35 of the charter provides: *"No member of the Council shall* hold any other municipal office or hold any office or employment the compensation of which is paid out of the municipal moneys except as otherwise provided in this Charter; or *be* elected or *appointed to any office* created or *the compensation of which is increased by the Council while he was a member thereof."*

It is claimed that the italicized portions of this section bar Robertson from the position in question.

Section 27 of the charter provides in part: "The Council shall appoint an officer, who shall be known as the City Manager, who shall be the administrative head of the Municipal Government. * * * He shall receive such salary as may be fixed by the Council; provided, however, that said salary shall not exceed the sum of $10,000 *per annum.* * * *"

A portion of § 30 of the charter is relevant to the present controversy. It provides: "The chief officials of the City shall be City Clerk, Assessor, Treasurer, Collector, Attorney, Engineer, Chief of Police, Fire Chief, Street Superintendent, Health Officer and five Library Trustees. * * *" The city manager is not mentioned in this enumeration.

It should be noted that § 35 of the charte above quoted was adopted in 1923. Prio to that time the section contained a similar prohibition except that the prohibition against appointment of any councilman to any office the compensation of which was increased during his term as councilman was limited to "until one year after the expiration of the term for which he was elected." This quoted limitation was removed by the adoption of the 1923 amendment. The city manager form of city government was adopted by Berkeley in 1923.

The public policy behind such provisions as § 35 is obvious. It is to prevent councilmen from abusing their appointive powers by appointing one of their own members, or one of their recently resigned members, to offices created or the compensation of which was increased by the council of which the nominee was a member. In many jurisdictions it has been held that without a statutory or charter provision such as § 35 principles of public policy prohibit an appointing body from appointing one of its own members to any office. See collection of cases 30 Cal.L.Rev. 686. The California cases apparently do not go so far. In People ex rel. Moody v. Carter, 12 Cal.App. 2d 105, 54 P.2d 1139, it was held, among other things, that an appointing body could appoint one of its own members to another office as long as the two offices were not incompatible. In People ex rel. Bagshaw v. Thompson, 55 Cal.App.2d 147, 150, 130 P.2d 237, 239, this holding was referred to as dictum, and this court stated: "In so far as the Carter case is concerned, we may say that the dictum above quoted is not in harmony with the weight of later authority." We do not find it necessary in this case to determine whether the dictum in the Carter case or the criticism of that dictum in the Thompson case is sound because we here have a charter provision adopting, in part, that rule of public policy.

Section 35 provides that members of the council are disqualified from appointment "to any office * * * the compensation of which is increased by the Council while he was a member thereof." In other words, the prohibition applies not only while the person involved remains a member of the council, but also applies thereafter if the council of which the person is a member raised the compensation of the office. No other interpretation seems reasonable. The limitation would appear to be clear and unambiguous. On its face it would seem to apply directly to the situation here presented. Admittedly, the council of which Robertson was a member increased the compensation of the then city manager from $7,500 to $8,500, and from $8,500 to $10,000. Petitioners seek to avoid this somewhat obvious interpretation by the following argument: They first point out that when the last resolution was adopted by the council on January 21, 1947, Robertson was not then a member of the council, having resigned, and his resignation having been accepted on January 14, 1947. They then point out that when the council fixes the salary of a city manager the salary is not fixed for the "office" but for the incumbent, dependent upon his personal qualifications. It is contended that this does not apply to the offices mentioned in § 30 where the salary is fixed by the council for the office and not for the incumbent, and where there is no maximum limitation such as is contained in § 27. It is then argued that since the salary fixed for city manager is personal to the incumbent, and the maximum is fixed by the charter, that, when an incumbent city manager resigns, his salary terminates, and at that moment there is no salary fixed for that office, except, that under § 27, the new appointee may not receive more than $10,000 per year. When a new appointee is selected the council bargains with such candidate as to what salary he will receive, and when the council fixes that salary it is a new salary to be paid to that person and not a salary to be paid the "office" of city manager. Applying these arguments to the factual situation here presented petitioners argue that, although the salary paid Fisk when Robertson became a member of the council was $7,500, and although the council of which Robertson was a member then hired Vander Ende at $8,500, that did not amount to increasing the compensation of the "office" of city manager. In the same way it is argued that when the council of which Robertson was a member raised Vander Ende to $10,000 per year it did not increase the salary of the "office" of city manager, but simply increased the salary of Vander Ende. When Vander Ende resigned, so the argument goes, there was no salary at all fixed for the "office" of city manager and the council was in a position to bargain with any candidate subject only to the limitation that not more than $10,000 per year could be paid. It is also contended that to give § 35 the interpretation desired by respondent will result in a city councilman of Berkeley being forever barred from appointment or election to any Berkeley city office, the salary of which was raised by him as a city councilman. This, say petitioners, will discourage competent people from seeking the position of councilman and will deprive the city forever of the services of otherwise qualified men and women. Petitioners urge that these arguments raise an ambiguity as to the application of § 35 to the facts of this case, and that under the rule of construction set forth in Carter v. Comm. on Qualifications, etc., 14 Cal.2d 179, 93 P.2d 140, this court must resolve that ambiguity in favor of eligibility to the office. In that case at page 182 of 14 Cal.2d, at page 142 of 93 P.2d it was stated: "* * * the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship. * * * The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office."

[1] These arguments, while ingenious, are unsound. In the first place, the problem in the instant case of appointing a councilman to an office, the salary of which was increased while he was a councilman, and the public policy behind the doctrine against self-appointment, were not involved in the Carter case. That case stands for the sound proposition that, other things being equal all ambiguities should be resolved in favor of eligibility to public office. That is a sound principle and is sound public policy. But in the instant case we are faced with another principle of public policy which has been codified into § 35. The policy behind such a provision is at least as strong as the policy enunciated in the Carter case. The rule of that case cannot be applied so as to distort the clear meaning of a statutory provision. The argument that by raising the salary of the incumbent city manager the compensation of the "office" of city manager was not raised, could be applied to any office, the salary of which is fixed by the council. If such argument is sound it would render practically meaningless the prohibition contained in § 35. It is quite clear that when the salary of city manager is raised the salary of that "office" is raised and the prohibition of § 35 automatically applies to the members of the council that were members at the time the raise was granted. No other interpretation is reasonably possible.

[2, 3] The argument that such an interpretation renders any councilman who votes for a raise in salary for any office forever ineligible to appointment or election to that office, and that the city may thus be deprived of competent public servants, is one that should be addressed to the framers of the city charter and to the electorate. Moreover, that problem is not before us. Whether the prohibition only applies for a reasonable time after the councilman severs his connection with the council, or until the end of his term, or applies forever, and whether the council could have fixed Robertson's salary at $7,500, the amount being paid Fisk when Robertson became a member of the council, and thus have avoided the application of the section, are problems not before us. Here Robertson's term as mayor does not expire until June 30, 1947. The council first appointed Robertson city manager while he was still a member of the council and fixed his salary at $9,000 per year, some $1,500 in excess of what was being paid Fisk when Robertson's term as mayor commenced. Then, in apparent realization that such appointment violated the charter, the council rescinded its action, accepted Robertson's resignation as mayor, and then a week later reappointed him city manager at the $9,000 salary. There can be no escape from the conclusion that such appointment violated the letter and spirit of § 35.

The alternative writ is discharged and the petition for a peremptory writ is denied.

WARD, J., concurs.

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